Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

ALLEN LEE MAY,

Petitioner,

v.

GMC MANSFIELD METAL FABRICATING; UAW INTERNATIONAL; UAW LOCAL 549,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether, the Court of Appeals for the Sixth Circuit erred in Affirming the District Courts Granting of Summary Judgment for Respondents where the District Court held that no issue of material fact existed for trial on Petitioners claims against Respondents GM,UAW International and UAW Local 749 because: Petitioner raised genuine issues of material fact?

II. Whether the Court of Appeals for the Sixth Circuit erred in Affirming the District Court's application of the correct standard of the McDonnell Douglas v Green analysis to the facts of this case?

III. Does the Summary Judgment Standard in employment discrimination cases require that the issue must be presented to the jury when the Petitioner raised genuine issues of material fact that the Respondents Profferred reason are pretextual?

IV. Does justice and public require that the United States Supreme Court overturn and soften the McDonnell Douglas Corp v. Green (1973), 411 U.S. 792, 93 S. Ct 1817, 36 L.Ed. 2d 668.

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT PROVISIONS 1
STATEMENT 2
REASONS FOR GRANTING THE WRIT 17
CONCLUSION 27
APPENDIX
Circuit Court Decision 1a
Relevant Statutes 6a
District Court Decision 8a

TABLE OF AUTHORITIES

CASES

CHAVEZ V. COORS BREWING CO., (C.A. 10, 1999) 176 F 3D 488, 488 19

MCDONNELL DOUGLAS CORP V. GREEN, 411 U.S. 792, 93 S. CT 1817, 36 L. ED. 2D 668 ..... 21, 24

MCKEE V. YOUNGSTOWN STEEL DOOR CO. (1980), 4 OHIO APP. 3D 32 19

MITCHEL V. TOLEDO HOSP (CA 6, 1992) 964 F 2D577, 582 22

MURPHY V. CITY OF REYNOLDSBURG, 65 OHIO ST., 3D, 604 N.E. 2D 138 (OHIO 1992) 17

SOUTH V. FIRESTONE TIRE AND RUBBER CO 875 F2D 1325. 1330 (C.A. 7 1989) 19

TEXAS DEPT. OF COMMUNITY AFFAIRS V. BURDINE (1981) 450 US 248, 252-253 101 . CT 1089, 67 F ED 2D 207 24

STATUTES

28 U.S.C. 41 2

28 U.S.C. 1257 2

28 U.S.C. 1331 ..... 2, 3

42 U.S.C. 1981 ..... 1, 2, 3

42 U.S.C 2000(E) 1, 2, 3

OPINONS BELOW

This is an action for employment discrimination brought by Allen Lee May against his employer GM and UAW International and UAW Local 549. This action was filed on November 13, 2000 in the United States District Court for the Northern District of Ohio and then to the United States Court of Appeals for the Sixth Circuit. Te governing legislation is Title VII, 42 U.S.C. Sec. 2000e, et. Seq., 42 U.S.C. 1981 and Chapter 4112, et. Seq, of the Ohio Revised Code.

This matter began on November 13, 2000, when Allen Lee May, an African-American employed by GM as a pipefitter, filed a complaint to the United Sates District Court for the Northern District of Ohio, therein, be alleged among other things that his employer, GM, and his Union, UAW International and UAW Local 549 discriminated against him on the basis of his race with regard to the opportunity to perform overtime work, the Union failure to process grievances regarding overtime wrongfully denied him which resulted in the denial of his Civil Rights; the Union's revocation of his Welder's Journeyman Card and GM's denial of a welding position. In addition, Mr. May alleges a breach of contract and bad faith representation by UAW LOCAL 549 and UAW International.

GM, UAW International and UAW Local 549 filed Motions for Summary Judgment in the District Court on January 7, 2003. Petitioner, challenged these motions by filing Memoranda in Opposition to these motions asserting that material issues of facts existed which precluded Summary Judgment. Thereafter, GM, UAW International and UAW Local 549 filed their respective Replies. Over and above the Petitioners objections, on April 29, 2002, Honorable Donald C. Nugent issued a

Decision and Order granting the Summary Judgments of GM, UAL International and UAW Local 549 on all issues and dismissing the case. Petitioner Appealed.

On March 20, 2003, the Court of Appeals for the Sixth Circuit affirmed. Granting respondents request, the Court determined Petitioners' Appeal did not establish that comparable nonprotected individuals were treated differently and that Although May applied for a welder's position, the position was filled by an individual who, unlike May, was qualified and had more seniority than May. Therefore, May's allegations regarding racial discrimination fails.

JURISDICTION

Subject matter jurisdiction for the United States District Court for the Northern District of Ohio was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C 2000(e), et. Seq., 42 U.S.C. 1981 and 28 U.S.C 1331 (general federal question jurisdiction).

Subject matter jurisdiction for the United States Court of Appeals for the Sixth Circuit was invoked through 28 U.S.C. 41.

The judgment of the Court of Appeals for the South Circuit was entered on March 20, 2003. Justice Stevens signed an Order extending the time for filing this Petition for Carrmaie to and including July 18, 2003.

Jurisdiction of this Court is invoked under 28 U.S.C. 1257 (a).

RELEVENT PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972

42 U.S.C. 2000(e) et. Seq.
42 U.S.C. 1981
28 U.S.C. 1331

STATEMENT OF THE CASE

A. General Background and Description

Allen Lee May is an African American employed by GM as a pipefitter. He was hired by GM on or about October 26, 1983, as a Journeyman Pipefitter in the Michigan facility. During Mr. May's employment at the GM Mansfield facility, he worked as a second-shift Journeyman Pipefitter in the Assembly Tool Builder Group (: "ATB Group") and a member of the UAW Local 549 and UAW International, along with one other second-shift Pipefitter, Gary Mills, who is Caucasian.

During the entire proceeding below, in the District Court, both Petitioner and the Respondents relied almost totally on affidavits as proof of their assertions. Very few documents, were produced by either side, with the exception of Mr. May's deposition and Respondents, production of the Memorandum of Agreement between GM and UAW.

B. Application for the Journeyman Welders UAW Card

Mr. May became interested in obtaining a Welder's Journeyman Card from UAW around arch of 1999. However, UAW International and/or UAW Local 549 refused to process his request and delayed verification of the card. Only after Mr. May re-inquired

as to the status of the cards months later was it processed. The refusal of UAW International and UAW Local 549 to properly process Mr. May's application for a Welder's Journeyman Card assisted GM in the explanation for denying Mr. May the Welder's Journeyman position for which he applied. This statement is verified by the following inserts from Mr. May's deposition:

> Question: –but was it your understanding that without the welding card, the company couldn't put you in this—either one of these positions?
>
> Answer: No, because at the particular time a person qualified, you can go in under the EIT, and what they did was hire a person off the street and put them in how you classify as apprenticeship, so-other—you didn't have to have your journeyman card to have these positions.
>
> Question: Okay. General Motors records indicates that you applied for the Gas and Arc Welder position.
>
> Answer: Yes.
>
> Question: Okay. Did you apply for the Die Welder Position also?
>
> Answer: Yes.
>
> Question: Do you have any documents?
>
> Answer: Yes. I sent them a—

It is evident from Mr. May's deposition that his version of the facts indicated that although Mr. May wanted and desired his journeyman Welder's Card that the card itself did not prevent a person who did not possess a Journeyman Welders card from being awarded either the position for Journeyman Gas and Arch Welder or the position of Journeyman Die Welder. These facts are further confirmed by the job posting, itself, which indicated that on June 17, 1999m two Welding Positions were posted, which stated:

> "The plant has an immediate opening for a Journeyman/woman in each of the trades listed below. Any employee who is currently a Journeyman/woman in either of these Trades is encouraged to apply for the opening by submitting a "729" application in the Plant Personnel Services Center. (Journeyman/woman) Under the GM-UAW National Agreement Requires Proof of Completion of a Bonafide Apprentice Program or proof of (8) years of Experience in the trade. Posted: June 17, 1999 and Removed: June 30, 1999.
> Larry Ware. Hourly Employment Supervisor.

The Memorandum of Understanding Definition of Journeyman/woman is also helpful in interpreting the job posting which states:

> DEFINITION OF "JOURNEYMAN/WOMAN"
> (178) The term "journeyman/woman" when used in this Agreement means an employee who: (1) has satisfactorily completed a bonafide apprentice training course with similar standards to the GM-

> UAW Apprentice Training Program, or (2) one who has properly carried such journeyman/woman status in any General Motors plant under the terms of previous agreements between the parties or (3) one who has been reclassified as a journeyman/woman under the terms of the Skilled Trades Section of this Agreement; or (4) one, newly hired, who meets one of the above alternative requirements or can prove work experience in the trade at least equivalent to that on-the-job experience required for reclassification to journeyman/woman status of those employes-in-traiing covered in Paragraph (166) of this Agreement. Copies of any documents presented pursuant to this provision will be furnished to the Chairperson of the Shop Committee upon request. (Pages 129-130).

The facts are undisputed that GM hired a white female from the outside to fill the Journeyman Die Welder position because the facts indicate that no other welder position was open in 1999. This is verified by GM Answers to Mr. May's Interrogatories and Request for Production of Documents and GM's Brief in Support of Motion for Summary Judgment. In Gm's Motion for Summary Judgment, they stated:

> "Although GM hired a white female from the outside, it was to fill an apprentice die welder position in 1999, completely different than the journeyman gas/arc welder position applied for by Plaintiff. The female employee who filled the position was not a journeyman, because

> the position was for an apprentice (Chuidioni Afd. #2 Note 3)

In addition, GM Answers to Mr. Mays Interrogatories and Request for Production of Documents stated:

> Question # 14: Whether a welding position was open at any time in 1999 and to state the name and race of person who obtained the position?
>
> Answer: Defendant, GM states that a welding position was open in the Mansfield facility in 1999. The following individuals applied for the position: Allen Lee May (African American) Wesley Miller (Caucasian), Steven Cope (Caucasian), Mark Boham (African American) Matthew McGuire (Caucasian), David Wert (Caucasian), Jerry Holsten (Caucasian). The open position was filled by William French (Caucasian).

The above facts indicate that GM could award either position to anyone with any qualification by allowing the applicant to accept the position through the apprenticeship program , if GM so desired.

C. Mr. May's Qualifications for the Journeyman Gas/Arch Welder Position

According to Mr. Mays Affidavit, the following facts are true:

> Mr. May presently possesses three journeyman cards is well aware of the

qualifications to receive a card. Mr. Mays time could be duplicated for the various cards. His present Pipefitters Journeyman card was obtained from working in Local 370, where welding is a combined trade with pipefitting and plumbing. In addition, he even held a welding license. A copy of Local 370's Certified Letter documenting his qualifications, is a part of his employment file. Although not documented by GM in Mr. Mays file. Mr. Mays has performed welding jobs for GM at Saginaw Break Plant and Pontiac Motors when needed. Further, Mr. Mays qualification are in accord the Memorandum of Understanding, Section above Titled : DEFINITION OF JOURNEYMAN/WOMAN, because Mr. May has completed a bonafide apprentice training course with similar standards to the GM-UAW Apprentice Training Program. As such, Mr. May qualified for the position regardless of whether he had a Journeyman Welder Card.

Further, it is undisputed by respondents that no lines of demarcation exist in Mr. May's ATB GROUP and Welders are part of Mr. Mays ATB Group. This is reflected in the MEMORANDUM OF UNDERSTANDING ASSEMBLY TOOL BUILDERS GROUP ("ATB") which states in pertinent parts:

The parties herein recognize the multiple skilled trades people of the assembly tool build group for their success in attracting

new work and new jobs to the plant. It is mutually agreed between the parties that this memorandum of understanding constitutes the assembly tool builder (ATB) agreement in the Mansfield Plant.

The ATB Group consists of the following classifications:

A. Checking Fixture Builder (CFB)
B. WEMR
C. Electrician
D. Pipefitter
E. Welder
F. Millwright
G. Carpenter/Painter

Employees assigned to this group will perform tasks necessary for the completion of the finished products to the fullest extent of their skill levels and ability, consistent at all times with plant safety practices. Although employees will maintain their skilled trade classifications, no lines of demarcation restrictions will be placed on skilled group members working together. Group members will utilize, where it is safe to do so, all plant tools and equipment necessary to complete the work assignment. Due to safety concerns, the termination of wiring in the interrogation cells will be performed by employees classified electrician or W.E.M.R.

As such, members within the group cush as non-pipefitter are performing jobs of pipefitter and pipefitters are performing jobs of non-pipefitters, for

example, whenever necessary to complete the job to the best of the employees skill level.

As stated earlier, and referring specifically to Mr. Mays statements in his deposition testimony, a journeyman welder's card was not needed to qualify for these positions which were posted on June 19, 1999 As evident by the fact that GM awarded the Welder's Die Position to a female from off the street through an apprentice training program or E.I.T. without regard to the fact that Mr. May had appled for the position and had more seniority. The Memorandum of Understanding regarding seniority reads as follows:

> GENERAL PROVISIONS REGARDING SENIORITY
>
> (153) Notwithstanding other provisions of this Agreement, Management may select non-journeymen/women seniority employees who have previously filed an application as provided above for the transfer to the skilled trades classifications for training and to perform the work in such classifications. Employees transferred to skilled trades classifications shall be selected on the basis of their qualifications, (including time worked after January 1, 1968, pursuant to Paragraph (179) unless otherwise mutually agreed between Management and the Shop Committee), and when their qualifications are the equal, employees with the longest seniority will be given preference. The recruitment, selection, employment and training of employees-in-training (E.I.T.) shall be without discrimination because of race, color, religion, national origin, sex,

> or sexual orientation. Affirmative action will be taken to provide equal opportunity in the Employee-in-Training Program (Page 119).

The facts are undisputed that Mr. May applied for both e Journeyman Die Welder Position and the Journeyman Gas and Arc Welder Positions which were posted by GM on June 17, 1999 and that he was offered neither by GM.

D. UAW Revocation of Mr. Mays Journeyman Welders Card, Lack of Representation by Union, Discriminatory and Bad Faith Conduct by Union Representative Ron Willis

UAW International and UAW Local 549 approved Mr. Mays application for a Journeyman Welders Card and then rescinded the card, notifying Mr. May by mail thirty after the card had been issued that the card was now revoked. UAW International made the decision to revoke Mr. Mays Journeyman Welders Card after receiving a telephone call from Mr. Ron Willis, who is currently the shop chairman for UAW Local 549 which is the Union that represents GM employees, including Mr. May. In his sworn affidavit, Mr. Willis made the following statements, explaining the matter.

> I have been elected Shop Chairman for UAW Local 549 for five years. The Shop Chairman is the Chief Local Officer, dealing with labor negotiations and contract administration, such as grievances processing. Part of my duties as a Shop Chairman involve pursuing grievances on behalf of individual union members.

Under the National Agreement, a UAW member employed at GM may receive a journeyman card w o has completed a bonafide apprentice hip program with similar standards to GM-UAW Apprenticeship Training Program or can prove work experience in the trade equivalent to eight years of on-the-job experience (See National Agreement, Exl Section 178 and 166)

I first became aware that Mr. May had applied for journeyman card as a welder, (he laready had a card as a pipefitter) in July 1999, when I received a letter from Uaw International Representative, Al Lewis, that Mr. May would be receiving a welder's journeyman card. Customarily, the application for a journeyman card is started though my office. I immediately called the UAW Skilled Trades Department in Detroit expressing my doubts about his qualifications as a welder. I was familiar with Allen Lee May, his work at out plant and some of his background because in July 1999, Local 549 was actively investigating matter of Mr. May. In the investigation of his claims of lack of overtime and subcontracting work to outside contractors when Local 549 skilled trades workers could perform the jobs. I was made aware of Mr. Mays working skills and background. The Local was also representing Mr. May in disciplinary proceeding by GMC.

> When I called Skilled Trades, I was aware that two other members of the Local were applying for a welders card. Thomas Karbula and David Wert (both Caucasian males). Even though they had experience as a welder, the Skilled Trades Department was requiring proof of eight years experience as a welder, even to the extent of requiring W2's from all these employers. Since the Skilled Trades Department was strictly following the guidelines for these two members, it should strictly be followed for Mr. May. Ultimately, the applications of Mr. May, Mr. Karbula and Mr. Wert were rejected.
>
> In the National Agreement, it recognizes that welding is a separate "apprenticeable" craft from pipefitting and/or plumbing. These are also recognized as distinct in the Local Assembly Tool Builder Group Agreement (ATB).

With the information that Chairman Willis brought to its attention, the Skilled Trades Department reconsidered its action on May and decided to disapprove the reclassification. On August 23, 1999, the Skilled Trades Department notified May that his card was being revoked and at that time his pipefitter-plumber card was reinstated. (See Klea letter attached to Peterson Aff. As Ex 2) May filed an appeal of the reconsideration action of the Skilled Trades Department. On December 15, 1999, William J. Peterson, Assistant Director of the Skilled Trades Department, notified May that his appeal had been rejected. He noted, "the policy of the Skilled Trades Department is that the trades of pipefitters and welder maintenance

and construction are not related, therefore, no time can be counted towards your reclassification." Essentially, the time used by May to qualify for his pipefitter card could not also be used to qualify for welders card.

Respondents, UAW International and UAW Local 549 provided the following answers to Mr. Mays Request for Interrogatories and Request for Production of Documents:

> 2. Identify each applicant for a welder journeyman card for the years 1998 through 2001.
>
> Answer: Tom Karbula, Allen Lee May (transfer from one craft to another), Jerry Montgomery, David Wert
>
> 8. For each applicant, identified in response to Interrogatory No. 6 state whether the International Union approval was revoked at any time and the date(s) thereof.
>
> Answer: May was the only member whose application was initially approved, but denied upon reconsideration.

With the above facts in mind, although disputed by respondents, the facts could be reasonably assumed that since ATB members possess multiple trades and skilled that such member of the ATB group would be permitted by UAW to count time worked in multiple trades toward obtaining more than one journeyman card, if in fact, the journeyman worked in multiple trades during the time period for eight years. Which is the version of the facts as asserted by Mr. May.

Respondents produced no rules or procedures or logical explanations to substantiate their claim than an employee's time spent working in multiple trades could not be counted towards more than one journeyman card.

E. Qualifications of Mr. William French, the GM Employee who received the Gas and Arc Welder Position for which Mr. May Applied

GM stated in their Brief in Support of their Motion for Summary Judgment that William French was awarded the position because Mr. French had a seniority date of July 12, 1965, had more seniority than Mr. May whose seniority date is December 13, 1983 and already possessed a Journeyman Welders Card, as he held a welding position at another GM plant. Mr. French's qualifications for the position were verified by and sworn affidavit from Thomas Chiudioni which states in pertinent parts as follows:

> I am currently employed by General Motors Corporation in Mansfield, Ohio, as a Labor Relations Analyst.....
> On July 17, 1999 the Mansfield facility posted job openings for a journeyman die welder and journeyman gas and arc welder. On June 18, 1999, May applied for the gas and arc welder position. Including May. Eight GM employees applied for the gas and arc welder position. Open positions that are filled internally are awarded to the qualified employee with the most seniority that applies for the position. William French, who has a seniority date of July 12, 1965 eventually filled the gas and arc welder position. May

> was not qualified for the welding position because he was not classified as a journeyman welder and did not have a journeyman welders card from the UAW. Without a journeyman welder card from the UAW, the company could not have given May the gas and arc welder job that he applied for, regardless of his seniority.

The above affidavit was the only evidence offered in supprt of GM's claim that Mr. French was more qualified because he already held a journeyman welder's card and had more seniority than Mr. May. As stated earlier, GM did not produce Mr. French's employment file nor provide any other documentation except the above affidavit to support their claim that Mr. French was more qualified than Mr. May and possessed more seniority than Mr. May.

F. Adverse Employment Action of GM's Denial of Welding Position Caused Mr. May Lost of Overtime Compensation

According to Mr. Mays deposition and Affidavit, the welders were working substantially more over time hours than his present pipefitting department. Therefore, Mr. May suffered a lost of overtime compensation due to GM's denial of the welding position to him. Respondent GM challenged these facts by stating that May had suffered no Adverse Employment action. However, GM did not challenge Mr. Mays claim of loss overtime as false. Nor did they produce any evidence disputing this claim. GM stated in their brief in Support of their Motion for Summary Judgment that Mr. May had not proven that he would have obtained more overtime compensation as a welder.

G. Sixth Circuit Affirms

On May 24, 2002, Petitioner filed a timely notice of appeal. On March 20, 2003, by Memorandum Decision and Opinion, the Court of Appeals for the Sixth Circuit affirmed it found that the appellant Allen Lee May did not establish that comparable nonprotected individuals were treated differently and that although May had applied for a welding position, the position was filled by an individual who unlike May was qualified and had more seniority than May, and therefore, May's allegations regarding racial discrimination fails.

REASONS FOR GRANTING WRIT

I. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURTS GRANTING OF SUMMARY JUDGMENT FOR RESPONDENTS WHEN THE DISTRICT COURT HELD THAT NO ISSUES OF MATERIAL FACT EXISTED FOR TRIAL ON PETITIONERS CLAIMS.

A. Summary Judgment Standard

The Fed. R. Civ. 56(C) places a mandatory duty on a trial court to thoroughly examine all appropriate materials filed by the parties before ruling on a motion for summary judgment. The failure of a trial court to comply with this requirement constitutes reversible error. Murphy v. City of Reynoldsburg, 65 Ohio St., 3d, 604 N.E. 2d 138 (Ohio 1992). An appellant court (like a trial court) must examine the record to determine whether there is a genuine issue of material fact. An appellant court reviewing a trial court's decision to grant a Fed. R. Civ. 56 (C) motion must look at the

evidence in a light most favorable to the non-moving party, construing all doubts in favor of that party.

In the present case, neither the District Court nor the Court of Appeals for the Sixth Circuit scrutinized the conflicting facts in the case nor resolved them in favor of he petitioner. The facts in petitioner's affidavit, deposition, Answers to Interrogatories and exhibits were clearly in dispute with Respondents GM, UAW International and UAW Local 549. Both Petitioner and Respondents relied basically on evidence submitted in affidavits to confirm their version of the facts. (With the exception that Petitioner's presented substantial exhibits that Mr. May had received several disciplinary action for coming to work in a hung over state and that they suspected that he had problems with alcohol abuse). Petitions were very successful below in their used of their allegations of work related disciplinary actions relating to alcohol abuse to distract the lower court's attention away from the real issues of discrimination.

Issues of material fact existed in the present case as to be whether Petitioner was qualified for the position for several reasons mentioned above. UAW International initially approved Mr. Mays application for a Journeyman Welders Card and later revoked the card after UAW International received a phone call from Ron Willis, Union Representative, whose job was to advocate on behalf of Mr. May. Instead, Mr. Willis comments to UAW International resulted in the revocation of Mr. Mays Journeyman Welders Card.

."A union breached its duty of fair representation when its conduct towards a member of the collective bargaining unit is arbitrary, discriminatory or in bad

faith." McKee v. Youngstown Steel Door Co. (1980), 4 Ohio App. 3d 32

Ron Willis, union representative's behavior in calling UAW International and stating that Mr. May was not qualified to receive a journeyman welders card which resulted in the revocation of Mr. Mays' Journeyman welders card was a breach of UAW duty of fair representation because the conduct was discriminatory and in bad faith.

In determining whether comments made in workplace constitute unlawful discrimination, issue before the court is whether there is a nexus between the comments and the plaintiff's employment. Whether comments are made by person's having decision making authority is not determinative. South v. Firestone Tire and Rubber Co 875 F2d 1325. 1330 (C.A. 7 1989)

In the present case, Mr. May has shown this nexus between the union representative Ron Willis' remarks to UAW International that Mr. May did not qualify for the journeyman welder's card, which is an adverse employment decision.

In Chavez v. Coors Brewing Co., (C.A. 10, 1999) 176 F 3d 488, 488, the court stated, " Pretext may be demonstrated by showing such weakness, implausibilities, inconsistencies, incoherences or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable fact finder could find then unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.

In the present case, respondent GM proffered reason that Mr. May was not granted the welding

position because he was not qualified because he did not have a welders journeyman card. GM alleges that the position was awarded to William French because he possessed the welders journeyman card and had more years of seniority than Mr. May is pretextual.

This issue of pretext is properly inferred because GM refused to produce the employment file of Mr. French and provided no other documentation that Mr. French did possess a welders journeyman card and had more seniority than Mr. May. Mr. French's qualifications were only verified by an affidavit from Respondent GM's employee, Mr. Chiudioni. Further, Respondent GM answered to Mr. Mays interrogatories and request for production of documents stated that only one welding position was open in 1999. Whereas the job posting itself stated that there were two welding positions open: a journeyman gas and welding position and a journeyman die welding position. Mr. Chiudioni's affidavit provides further conflicting information regarding the open position when he states in his sworn affidavit that there was an apprentice die welding position open in 1999, which was filled by a white woman off the street, but that that position was completely different from the position applied for by Mr. May. However, Mr. May stated in his deposition that he applied for moth positions and he further states that no journeyman welders card was necessary to obtain either of the positions.

The above are all issues of material facts which should have been considered by the Federal District Court and the Court of Appeals for the Sixth Circuit erred when it affirmed the granting of summary judgments for respondents by the Federal District Court.

II. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURTS APPLICATION OF THE IMPROPER LEGAL STANDARD IN MCDONNEL DOUGLAS CORP V. GREEN

Petitioner now addresses the issues involving the standard of review in race discrimination claims. These issues involve question of law, essentially, whether the trial court applied the proper legal standards. The general formula to be used in all discrimination cases involves three steps established in McDonnell Douglas Corp v. Green, 411 U.S. 792, 93 S. Ct 1817, 36 L. Ed. 2d 668. The first step require the plaintiff to establish a prima facie case in which the plaintiff alleged the employer did not rehire him on basis of race, such a prima facie case can be established by the plaintiff: (1) the plaintiff belonged to a racial minority; (2) the plaintiff applied and was qualified for the job; (3) the plaintiff was rejected and (4) after such rejection, the position remained open and the employer continued to seek applicants with plaintiffs qualifications. McDonnell Douglas at 802. The court noted that facts will vary in Title VII cases and as such, the prima facie case spelled out above may not be applicable to every case. Id at note 13. Hence slight modifications to the above prima facie requirements have been made depending on the type of discrimination alleged and/or the facts in a particular case.

In the present case, the Federal District Court erred as a matter of law in applying but one standard in reviewing petitioners prima facie case and in concluding petitioner failed to establish prima facie case. The prima facie case applied by the Federal District Court is an acceptable method but not the only method by which to establish a prima facie case is a suit alleging racial

discrimination. Mitchel v. Toledo Hosp (CA 6, 1992) 964 F 2d577, 582. Hence Mr May could attempt to prove his prima facie case by showing the first three prongs: 1) Plaintiff was a member of the protected class; (2) The plaintiff applied for a position for which he was qualified and was rejected, (3) that the person hired was outside of the protected class.

In the case at bar, plaintiff can establish a prima facie case by applying the third prong that Mr. French was a person hired outside of the protected class. Since Mr. French was white. Rather, the District Court incorrectly concluded that Mr Mays claim failed because " he failed to support the allegations with evidence that a similarly situated non-minority, with the same qualifications, was, in fact hired. The District Court then further concluded that Mr. William French was not similarly situated.

The question then becomes whether this constitutes reversible error, since the Federal District Court and the Court of Appeals erred in allowing only one standard to Petitioner Prima Facie Case and further erred in that neither court applied the remaining two burden shifting steps in the McDonnell Douglas analysis, these two important failures of the Federal District Court and the Court of Appeals was reversible error.

III. THE SUMMARY JUDGMENT STANDARD IN EMPLOYMENT DISCRIMINATION CASES REQUIRE THAT THE ISSUE MUST BE PRESENTED TO THE JUY WHEN THE PETITIONER RAISES THE GENUINE ISSUES OF MATERIAL FACT THAT THE RESPONDENTS PROFERRED REASONS ARE PRETEXTUAL.

Because a qualified person could be hired through the EIT program as the unidentified white applicant had been. She was granted a Welders position which was also posted on June 17, 1999. In addition, Ron Willis and Mr. Chiudioni both stated in their affidavits that positions are granted internally to the qualified employee who applies for the position. Finally, the job posting itself, of June 19, 1999 instructs present employees who possess journeyman/woman welding cards to fill out the applicable application (Form 729). Yet it is undisputed that Mr. William French never applied for the position. Respondent, GM produce no dates as to when Mr. French transferred into the Gas Arc Welding position.

When taken together, all these aforementioned conflicting inconsistencies indicate that GM proffered reason regarding the filling of the position by Mr. William French are pretextual. As such, a dispute of the facts exist for the trial of fact on the issue of whether Mr. French was better qualified than Mr. May for the Welding position and whether GM Proffered reason was pretextual and motivated by racially discriminatory intent. Further, the evidence shows that there was a Die Welding position also open in 1999, for which the petitioner did apply. Respondent G presented no evidence regarding that position and denied that any other welding positions were open except a short mention of a die welding apprentice position, which was filled by an unknown white woman, with no evidence as to when that position was open or posted to employees.

The trial court ignored two significant procedural facts: Although Mr. May retains the ultimate burden of persuasion, the burden of producing evidence continues to alternate between the parties. Texas Dept. of

Community Affairs v. Burdine (1981) 450 US 248, 252-253 101 . Ct 1089, 67 F Ed 2d 207.

For the afore mentioned reasons, Respondent GM has failed in their burden of production. Public Policy required that the decisions of the United States Court of Appeals be reversed because the Summary Judgment based on the facts of this case is simply wrong. The lower courts did not interpret the evidence in favor of the petitioner, Mr. May, but instead in favor of the respondents. The Lower Courts were swayed by the Respondents arguments that Petitioner Allen Lee May was disciplined several times for alcohol abuse. Using this argument, the Petitioners were successful in discrediting the Petitioner before the lower Courts. To allow this decision to stand deprives petitioner of his right to be free from discrimination in his work place.

IV. JUSTICE AND PUBLIC POLICY REQUIRES THAT THE UNITED STATES SUPREME COURT OVERTURN OR SOFTEN THE MCDONNELL DOUGLAS COPR V. GREEN LANDMARK CASE 411 U.S. 792 (1983)

The McDonnell Douglas framework which is a vehicle to prove discrimination through indirect evidence when the employee has no evidence of direct discrimination. However, the affect of the McDonnell Douglas Frame work is deficient in that it requires much of the employee and little of the employer. For example, the employee has the burden of proof, while all the employer has to do is articulate some legitimate, non-discriminatory reason for the employer's action, in order to rebut the presumption after the employee has established a prima facie case. If the employer carries his burden of producing evidence that his actions were for a non-discriminatory legitimate reason, then the

presumption of discrimination drop from the case. Finally, the employee must then prove that the employer's reasons for its actions were pretextual.

McDonnell Douglas vs. Green was decided in 1973. Over 30 years ago. Much has changed since that time. Originally the framework was intended to guide the court and the parties to establish circumstantial evident of discrimination when the employee had no evidence of direct discrimination. However, since McDonnell Douglas was decided over 30 years ago, Employers are much smarter and educated. Only about 1-2% of litigated discrimination cases exist where there is actual evidence of direct discrimination. As such, McDonnel Douglas has become the corner stone and framework which guides and directs all the Court in the United States.

Unfortunately, the framework requires so much proof on the part of the person bringing an employment discrimination case that the very vehicle it was chosen to do is eaten up. As such, Petitioner advocates that the present time is ripe to review McDonnell Douglas v. Green, prima facie case, circumstantial evidence formula because the affect of the formula impacts too greatly on the employee who sues his employer for discrimination and too softly on the employer being sued, resulting in the rule of law having virtually no affect.

The majority of discrimination cases are decided against the plaintiff by Summary Judgment because the plaintiff (employee) is unable to carry the burden of proof under the framework. The fact is further complicated by the summary judgment rules when the Judge must decide the difference between a long, lengthy trial and the evidence before him now.

The McDonnell Douglas framework of proof on the plaintiff is so harsh that many attorneys refuse to accept discrimination cases because their chances of surviving a summary judgment motion are almost none existent in the Sixth Circuit.

On the other hand, if it is not the rule itself that should be over turned or modified, then there exists at this time needed guidance from the United States Supreme Court to the Lower Courts, who are responsible for correctly applying the rule of law.

A plaintiff is fortunate indeed, if he can find an attorney to represent him in his discrimination suit. Because of the expensive legal cost and/or long litigation, most employees can't afford to hire an attorney. For the same reason, many attorneys refuse to litigate employment discrimination cases. Further, attorneys have the additional worry of losing at the trial level on Motion for Summary Judgment.

The majority of plaintiffs who have lost at the trial court level lack the funds and/or courage to pursue the case further to the Court of Appeals. As such, if a plaintiff is lucky enough to get past the hurdles of locating an attorney, obtaining the money for legal fees and a dose of courage and finally makes his way through the courthouse steps, he expects to find justice there. Unfortunately, and many to many times, justice is not there. If not in the courts, then where is justice? Is Justice lost? Yes, Justice is lost in the courts granting of the employer's Motion for Summary Judgment.

A court in deciding on a motion for summary Judgment should focus on the employer's burden of production and consider carefully whether the employer has met this burden. A court should be very slow to

decide summary judgment motion where as in the present case, the employer's only production of evidence consists of affidavits only without supporting documents. Such affidavits are easily obtained. Whereas, employment files, applications for employment and the like are not easily manufactured, and, as such are better forms of evidence.

This court should grant this petition to: reassert the importance of the lower court applying the correct standard of the McDonnell v. Green analysis to the facts of employment discrimination cases, impress upon the lower courts the flexibility of the standard and give guidance to the lower courts on the types of better evidence which should be produced by an employer before granting Summary Judgment.

CONCLUSION

THEREFORE, Petitioner, Allen Lee May requests of this court that it GRANT its Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 02-3589

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALLEN LEE MAY,
Plaintiff-Appellant,

v.

GMC MANSFIELD METAL FABRICATING; UAW INTERNATIONAL; UAW LOCAL 549,
Defendants-Appellees.

March 20, 2003, Filed

COUNSEL: For ALLEN LEE MAY, Plaintiff - Appellant: James H. Banks, Dublin, OH.

For GMC MANSFIELD METAL FABRICATING, Defendant - Appellee: James M. L. Ferber, Alison Day Hall, Littler & Mendelson, Columbus, OH.

For UAW INTERNATIONAL, UAW LOCAL 549, Defendants - Appellees: Frederick G. Cloppert, Jr., Cloppert, Latanick, Sauter & Washburn, Columbus, OH.

JUDGES: Before: MARTIN, Chief Judge; KENNEDY and DAUGHTREY, Circuit Judges.

OPINION: ORDER

Before: MARTIN, Chief Judge; KENNEDY and DAUGHTREY, Circuit Judges.

Allen Lee May, an Ohio resident represented by counsel, appeals a district court judgment dismissing his civil action filed pursuant to 42 U.S.C. §§ 1981, 2000e (Title VII) and Chapter 4112 of Ohio Rev. Code. May also alleges a breach of contract. The parties have waived oral argument, and this panel agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking monetary relief, May sued the United Auto Workers International, the Local United Auto Workers (Union), and General Motors Corporation (GM) alleging discrimination regarding the opportunity to perform overtime work, the opportunity to work a fourth of July shut down, the union's failure to process his grievance regarding the denial of overtime, the disciplinary action filed against him, the union's revocation of his journeyman's welders card, and the denial of a welding position. The district court granted summary judgment to the defendants.

In his timely appeal, May asserts that the district court erred in concluding that: 1) he did not present evidence of discrimination; 2) the actions complained of were not racially motivated; the evidence was insufficient to establish a hostile work environment; and 4) the UAW did not act in a discriminatory fashion or breach its duty of fair representation.

The district court's judgment is reviewed de novo. *See Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir. 1996). A Title VII race discrimination claim is analyzed in accordance with the burden shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), which requires that a plaintiff must first prove a prima facie case of discrimination. *Id.* at 802. In order to establish a prima facie case of race discrimination, the plaintiff must show that: 1) he is a

member of a protected class; 2) he was subjected to adverse employment actions; 3) he was qualified for the position in question; and 4) he was replaced by a nonprotected person or similarly situated nonprotected employee receiving preferential treatment. *Id.* In order to compare his treatment to that of a nonprotected employee, the plaintiff must show that he or she is similarly situated to the nonprotected employee in all relevant respects. *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 353 (6th Cir. 1998).

Once a plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the adverse employment action. *McDonnell Douglas Corp.*, 411 U.S. at 802. If the defendant is able to establish a nondiscriminatory reason for the adverse action, the burden shifts back to the plaintiff to produce credible evidence that the reason offered by the defendant is a mere pretext for unlawful discrimination. *Id.* at 804.

As the district court noted, May did not present any direct evidence of discrimination. Although he claimed to have been treated differently from similarly situated non-minority employees, the evidence, as extensively summarized by the district court, establishes that comparable nonprotected individuals were not treated differently. The evidence regarding May's complaint as to overtime and overtime assignments do not show any discriminatory conduct. The same is true regarding his application for a welding position. Although May applied for a welder's position, the position was filled by an individual who, unlike May, was qualified and had more seniority than May. Therefore, May's allegation regarding racial discrimination fails.

May contends that the defendants' actions created a hostile work environment. In order to establish a claim for a hostile work environment, a plaintiff must demonstrate that: 1) he was a member of a protected class; 2) he was subject to harassment; 3) the harassment was based on his race; 4) the harassment unreasonably interfered with his work performance; and 5) the defendant knew or should have known about the harassment and failed to take corrective measures. *See Blankenship v. Parke Care Ctrs., Inc.*, 123 F.3d 868, 872 (6th Cir. 1997). The Supreme Court has elaborated on what type of conduct can constitute harassment and form the basis of a hostile work environment claim. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993). To prevail, the plaintiff must show conduct that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and [to] create an abusive working environment." Conduct that is "merely offensive" will not suffice to support a hostile work environment action. *Id.*

The facts establish that May was not subject to a hostile work environment. The record reflects that May's problems were a result of his alcohol abuse and that both GM and the union went to great lengths to assist May. Although May identified three events which he contends were racially motivated, when management was notified of the events, the offensive objects were immediately removed. Thus, the fifth prong of the hostile work environment action as set forth in *Blankenship* was not satisfied.

Finally, May asserts that the union acted in a discriminatory manner and breached its duty of fair representation. A union breaches its duty of fair representation if its actions are either arbitrary,

discriminatory, or in bad faith. *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 585 (6th Cir. 1994). A union's actions will be considered "arbitrary" only if "in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." *Air Line Pilots Ass'n. Int'l v. O'Neill*, 499 U.S. 65, 67, 113 L. Ed. 2d 51, 111 S. Ct. 1127 (1991) (citations omitted). Consequently, "[a] union does not ... have to exhaust every possible remedy requested by a member facing disciplinary action." *Black*, 15 F.3d at 585 (citations omitted). Instead, "a union acts arbitrarily only if 'it handles a grievance in a "perfunctory" manner, with with caprice or without rational explanation.'" *Linton v. United Parcel Servs.*, 15 F.3d 1365, 1370 (6th Cir. 1994) (citations omitted).

The record establishes that the union acted aggressively to represent May's interests. Under no circumstances can the union's actions be considered "without rational explanation." *Id.* The union successfully settled many of May's grievances on his behalf and got numerous disciplinary actions expunged from May's employment record. To contend that the union's actions were a breach of fair representation is meritless.

Accordingly, we affirm the district court's judgment.

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

42 U.S.C. § 1981

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits,privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 2000c

As used in this subchapter -

(a) "Secretary" means the Secretary of Education.

(b) "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, sex or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

(c) "Public school" means any elementary or secondary educational institution, and "public college" means any institution of higher education or any technical or vocational school above the secondary school level, provided that such public school or public college is operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source.

(d) "School board" means any agency or agencies which administer a system of one or more public schools and any other agency which is responsible for the assignment of students to or within such system.

Supreme Court, U.S.
FILED

JUL 18 2003

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No. 03 220

In the

Supreme Court of the United States

ALLEN LEE MAY,

Petitioner,

v.

GMC MANSFIELD METAL FABRICATING; UAW INTERNATIONAL; UAW LOCAL 549,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL APPENDIX

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28 pp

(All footnotes trail the end of each document)

CASE NO. 1:00 CV 2866

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALLEN LEE MAY,
Plaintiff,

v.

GMC MANSFIELD, et al.,
Defendants.

JUDGE DONALD C. NUGENT

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon the following: (1) Motion of Defendants International Union United Automobile, Aerospace & Agriculture Implement Workers of America ("UAW International") and UAW Local 549 for Summary Judgment (ECF #30) filed with the Court on January 7, 2002; and (2) Motion of Defendant General Motors Corporation ("GM") for Summary Judgment (ECF #31) filed with the Court on January 7, 2002. Plaintiff' filed Memoranda in Opposition to Defendants GM and UAW (ECF #40, #42, respectively) on February 21, 2002. Thereafter, Defendants filed their respective Replies (ECF #45, #46) on March 7, 2002. For the reasons that follow, Defendants Motions (ECF #30, #31) are GRANTED.

Procedural and Factual Background[1]

Plaintiff, Allen Lee May, filed the instant action, pro se, against GM his employer, and UAW International and UAW Local 549, on November 13, 2000. On September 25, 2001, Plaintiff filed an Amended Complaint against Defendants, with the assistance of counsel, pursuant to Title VII, 42 U.S.C. §§ 2000e, et seq., 42 U.S.C. § 1981, and Chapter 4112, et seq., of the Ohio Revised Code. Plaintiff also made allegations of breach of contract.

Plaintiff, an African-American, who was (and is currently) employed by GM as a pipefitter, alleges that Defendants UAW and GM discriminated against him on the basis of his race. Specifically, Plaintiff alleges discrimination with regard to the opportunity to perform overtime work, the opportunity to work during a 4th of July shut-down, the Union's failure to process his grievance regarding the denial of overtime, the disciplinary action against him, and the Union's revocation of his journeyman welder's card and the denial of a welding position.

Mr. May was hired by General Motors in or about October 26, 1983, as a journeyman pipefitter, in its Michigan facility. In April of 1997, he requested and received a transfer to GM's Mansfield facility. It is at this time that Plaintiff worked as a second-shift journeyman pipefitter in the Assembly Tool Builder group (hereinafter "ATB" group), belonging to the UAW Local 549, along with one other second-shift pipefitter, Gary Mills, who is Caucasian. At all relevant times herein, Plaintiff was also a member of the UAW International. Plaintiff is currently employed at the Mansfield GM facility, wherein the allegations of the instant complaint allegedly arise.

During Plaintiffs employment with GM, Plaintiff worked under a series of collective bargaining agreements negotiated between GM and UAW. Such agreements are known as the National Agreement, entered into by GM and the UAW International, and the Local Agreement, entered into by GM and UAW Local 549. The National Agreement establishes the working conditions of UAW members employed by GM, including the rights of the union members and the responsibilities of GM. On the local level, the Local Agreement governs various items including overtime and health and safety issues.

The National Agreement and Local Agreement govern what is known as "equalization of overtime." The "equalization" is an attempt to provide GM employees an equal opportunity to work overtime, according to their department and their classification. Notice of the equalization is displayed in each department According to the Agreements, overtime is charged to employees who actually work or are offered the overtime and refuse. The National Agreement states, in relevant part, as follows:

> Extra work periods of part-time operation and overtime should be equalized among the employees in the group engaged in similar work, as far as practicable. Information concerning equalization of hours status will be openly displayed in the department in such a manner that the employees involved may check their standing.

National Agreement, ¶ 71. The employee within a particular group with the lowest number of overtime

hours is the first employee to be given the opportunity to work overtime. Affidavit of Thomas Chiudiori, ¶ 3.

The Local Agreement provides that equalization of hours groups will be defined by department, by classification, by shift, unless otherwise mutually determined by the parties. Local Agreement, Local Equalization of Hours Agreement,' 3. Further, the Agreement states as follows:

> In all departments, daily overtime including early starts and third shift will be offered to the employee-on-the-job who is expected to work the overtime required in connection with their job, except that management will make every reasonable effort to replace those employees who desire to leave at the end of their regular shift. If more than one (1) employee is assigned to a job and only one (1) employee is to be retained on that job for daily overtime the employee-on-the-job will be determined in accordance with paragraph 71 of the National Agreement ... If the employee-on-the-job refuses the overtime, their replacement will be selected on the basis of their standing on the overtime board.

Local Agreement, ¶ 20(A).

As a pipefitter, Mr. May is part of the ATB group, and his employment at the Mansfield facility is governed by the Memorandum of Understanding Assembly Tool Builder Group ("Memorandum of Understanding'), which is part of the Local

Agreement. The ATB group consists of several classifications of workers within its group, and the Memorandum of Understanding provides that there are no lines of demarcation between the skilled trades in this group. Therefore, GM may assign non-pipefitters work that is normally within the pipefitter classification. Specifically, the Memorandum of Understanding states as follows:

> Employees assigned to this group will perform tasks necessary for the completion of the finished product to the fullest extent of their skill levels and ability, consistent at all times with plant safety practices. Although employees will maintain their skilled trades classifications, no lines of demarcation restrictions will be placed on skilled group members working together.
>
> Overtime will be offered in accordance with the...Mansfield local overtime agreement except that weekend and holiday overtime offered to employees in the ATB group will be on a percentage basis ... reflective of the ATB group population on the shift, in accordance with local equalization of hours practices....

Memorandum of Understanding, ¶¶ 3,8.

Overtime

Plaintiff alleges that during his employment at GM's Mansfield plant, he was denied overtime and overtime opportunities "which are regularly afforded-

similarly situated white contemporaries." Amended Complaint ¶ 12(A). Further, he claims that he complained of the above to his superiors, with no redress. Id. In support of his allegation, Mr. May claims that employees from other departments would be brought into his department in order to work the overtime, all of whom were non-African-Americans. Mr. May also states that substantially more overtime assignments were being awarded to white employees working fast shift for the purpose of avoiding to award overtime to Mr. May. Mr. May claims that the allocation of overtime was not in accordance with the National Agreement or the Local Agreement.

Plaintiff allegedly became concerned with the allocation of overtime in or about 1998, filing seven grievances, with the assistance of Local 549, between March and June of 1999. Plaintiff's grievances concerned the overtime board and GM's alleged inaccurate record-keeping. None of the seven grievances alleged discrimination with regard to the allocation of overtime hours. The grievances were investigated. GM denied all allegations.

In one instance, Plaintiff claimed that the overtime board was off by approximately 77 hours (in 1997 and additional hours in 1998). As a result of the investigation, the local Committeeman, Craig Ferguson, determined that Mr. May may have been overcharged 43.5 hours. The Local Union offered to settle the grievance with Mr. Mills, the other second-shift pipefitter, being charged an additional 43.5 hours of overtime in order to "equalize" the time with Plaintiff. Plaintiff, however, refused this offer of settlement. Due to the alleged lack of documentation on Mr. May's part, Local 549 dropped the case.

In another instance, Committeeman Ferguson investigated allegations of violations of the equalization of overtime pay in the ATB group; and he filed grievances on behalf of the members of the group, including Mr. May, alleging that some employees had worked 11.5 hours and others had worked 10 hours. Thus, the hours were not equalized. Thereafter, in October of 1999, GM and Local 549 reached a settlement concerning such overtime allocation wherein 200 hours of back pay were divided among approximately 49 employees. Plaintiff received 4.1 hours of back pay as a result of the settlement.

Discipline

Plaintiff was disciplined on several occasions during his employ at GM's Mansfield facility. According to Plaintiff, the disciplinary actions taken by GM were racially motivated. On January 13, 1998, Plaintiff reported to work as scheduled, though he claimed to be having foot pain and that he was at the facility only to seek treatment from the plant doctor. Plaintiff was observed staggering, and management determined that Plaintiff was under the influence of alcohol. Plaintiff was escorted home. Plaintiff denies that he had been intoxicated. Upon his return to work, three days later, GM issued a disciplinary layoff ("DLO') of one week. Pursuant to a settlement between GM and Local 549, this discipline was modified to a DLO of one week with three days suspended, and the discipline was removed from Plaintiff's record after six months.

Plaintiff was observed intoxicated for a second time on November 2, 1998. GM management refused his access to the plant, and when he returned to work

three days later, he was issued another DLO of one week for reporting to the facility under the influence of alcohol and in an unsafe condition. This discipline was also modified as part of a settlement between GM and Local 549. The DLO was reduced and removed from his record after six months.

On January 29, 1999, Plaintiff received a two-week DLO for leaving the plant during his shift without permission. Once again, the discipline was reduced; and it would be removed from his record after nine months if he had no further violations during that time period.

Finally, on July 1, 1999, Plaintiff was disciplined, once again, for reporting to work under the influence of alcohol. This time, Plaintiff received a 30-day suspension due to the previous disciplinary action. GM and Local 549 reached a settlement whereby Plaintiff's 30-day unpaid suspension was converted to a 30-day paid sick leave, with the condition that Plaintiff attend alcohol rehabilitation and follow-up counseling. Plaintiff denies that he has a problem with alcohol, however, he agreed to, and did, in fact, take the sick leave.

July 4th Shutdown

During Plaintiff's sick leave, GM's Mansfield facility closed for a two-week July 4th shutdown during which all employees took an enforced paid vacation. This policy is mandated in the National Agreement. Employees may apply for work during plant shutdown, as some work is performed during this time, and receive holiday pay. However, employees on sick leave are not eligible to work during the shutdown. Plaintiff claims that GM's refusal to permit him to work during

this discrimination. Specifically, he claims that had he not been on sick leave during the July 4th shutdown, he would have earned extra income. Plaintiff admits, however, that when he agreed to the settlement, he understood that he would not be permitted to work during the plant shutdown.

Welder classification

On June 17, 1999, the Mansfield facility posted job openings for a journeyman die welder and a journeyman gas/arc welder. Plaintiff and seven other employees applied for the position of gas/arc welder. Plaintiff was classified as a pipefitter and held a pipefitter card. Plaintiff filed for reclassification of his card to welder, providing information pertaining to his welding experience. On August 19, 1999, UAW International notified Mr. May that he had been reclassified from pipefitter to welder. However, on August 26, 1999, the Union revoked Plaintiffs welder card, noting that "further review of [his] application [for a welder card] shows that time used during [his] plumber apprenticeship was calculated as time credited towards the journeyman welder card" and "the pipefitter-plumber-steamfitter classification is not a related classification to the welder classification." Therefore, as UAW International stated, Plaintiff was required to show eight years experience as a welder and he had not done so. Plaintiffs pipefitter card was reinstated. Plaintiff appealed the Union's decision, which was rejected. In a letter dated October 15, 1999, UAW International Representative, Leon Klea, stated that Mr. May did not possess the requisite minimum eight years experience as a welder, and in fact, the welding experience he submitted on his initial application was "far below the necessary requirements." Mr. William French, who had more

seniority than Mr. May, was awarded the welder position. Plaintiff, however, claims that he was denied this welder position on account of his race.

Summary Judgment Standard

Summary judgment is appropriate when the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The burden of showing the absence of any such "genuine issue" rests with the moving party

> [A] party seeking summary judgment always beats the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of `the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (citing Fm. R. CIV. P. 56(c)). A fact is "material" only if its resolution will affect the outcome of the lawsuit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. The court will view the summary judgment motion in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Summary judgment should be granted if a party who bears the burden of proof at trial does not establish an

essential element of their case. Tolton v. American Biodyne, Inc., 48 F.3d 937, 941 (6th Cir. 1995) (citing Celotex, 477 U.S. at 322). Accordingly, "[t]he mere existence of a scintilla of evidence in support of the plaintiffs position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff" Copeland v. Machulis, 57 F.3 d 476, 479 (6th Cir. 1995) (citing Anderson, 477 U.S. at 252). Moreover, if the evidence presented is "merely colorable" and not "significantly probative," the court may decide the legal issue and grant summary judgment. Anderson, 477 U.S. at 249-50 (citations omitted). In most civil cases involving summary judgment, the court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." Id. at 252. However, if the non-moving party faces a heightened burden of proof, such as clear and convincing evidence, it must show that it can produce evidence which, if believed, will meet the higher standard. Street v. J. C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir.1989).

Once the moving party has satisfied its burden of proof, the burden then shifts to the nonmover. The nonmoving party may not simply rely on its pleadings, but must "produce evidence that results in a conflict of material fact to be solved by a jury." Cox v. Kentucky Dep't of Transp., 53 F.3d 146, 149 (6th Cir.1995). Federal Rule of Civil Procedure 56(e) states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise

> provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

FED. R Civ. P. 56(e). The Federal Rules identify the penalty for the lack of such a response by the nonmoving party as an automatic grant of summary judgment, where otherwise appropriate. Id.

Though parties must produce evidence in support of and in opposition to a motion for summary judgment, not all types of evidence are permissible. The Sixth Circuit has concurred with the Ninth Circuit that "' it is well settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment."' Wiley v. United States, 20 F.3d 222, 225-26 (6th Cir.1994) (quoting Beyene v. Coleman Sec. Servs., Inc., 854 F.2d 1179, 1181 (9th Cir.1988)). Federal Rule of Civil Procedure 56(e) also has certain, more specific requirements:

> [Rule 56(e)] requires that affidavits used for summary judgment purposes be made on the basis of personal knowledge, set forth admissible evidence, and show that the affiant is competent to testify. Rule 56(e) further requires the party to attach sworn or certified copies to all documents referred to in the affidavit. Furthermore, hearsay evidence cannot be considered on a motion for summary judgment.

Wiley, 20 F.3d at 22526 (citations omitted). However, evidence not meeting this standard may be considered by the district court unless the opposing party affirmatively raises the issue of the defect. If the opposing party:

> fails to object before the district court to the affidavits or evidentiary materials submitted by the other party in support of its position on summary judgment, any objections to the district court's consideration of such materials are deemed to have been waived, and [the Sixth Circuit] will review such objections only to avoid a gross miscarriage of justice.

Id. at 226 (citations omitted).

As a general matter, the district judge considering a motion for summary judgment is to examine "[o]nly disputes over facts that might affect the outcome of the suit under governing law." Anderson, 477 U.S. at 248. The court will not consider non-material facts, nor will it weigh material evidence to determine the truth of the matter. Id. at 249. The judge's sole function is to determine whether there is a genuine factual issue for trial; this does not exist unless "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id.

In sum, proper summary judgment analysis entails "the threshold inquiry of determining whether there is the need for a trial–whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson, 477 U.S. at 250.

Discussion

Plaintiff alleges that Defendants' actions violated 42 U.S.C. § 1981, Title VII, and Chapter 4112 of the Ohio Revised Code. Plaintiff further alleges that the acts of UAW International and UAW Local 549 constitute a breach of

contract. The United States Supreme Court has held that race discrimination claims under 42 U.S.C. § 1981 are analyzed under the same evidentiary framework enumerated by the federal courts for race discrimination claims pursuant to Title VII. Patterson v. McLean Credit Union, 491 U.S.164,186 (1989). Furthermore, federal case law interpreting Title VII "is generally applicable to cases involving alleged violations of RC. Chapter 4112." Ohio Civil Rights Comm'n v. Ingram, 630 N.E.2d 669, 672 (Ohio 1994). Therefore, Plaintiff's discrimination claims will be analyzed under one standard as set forth below.

A plaintiff seeking to establish a Title VII discrimination claim has available two distinct theories of discrimination. Flatt v. Electric Research Mfg. Corp., 103 F. 3d 129, 1996 WL 694151, at *4 (6th Cir. Dec. 3, 1996) (unpublished) (citation omitted). "The first, disparate treatment, `occurs when an employer treats some employees less favorably than others because of race, religion, sex, or the like,' and requires proof of discriminatory motive." Id. (citing Huguley v. General Motors Corp., 52 F.3d 1364, 1370 (6th Cir.1995) (citation omitted)). The second, disparate impact, does not require proof of discriminatory motive, "because it is predicated on a theory that discrimination has `result[ed] from facially neutral employment practices that have a disproportionately negative effect on certain protected groups . . . . "' Flatt,1996 WL 694151, at *4 (citation omitted). In this case, Plaintiff seeks to pursue his claim of race discrimination against both Defendants under the theory of "disparate treatment."

I. Disparate Treatment Claim

Title VII prohibits employers from discriminating against employees on the basis of race. 42 U.S.C. § 2000e. "It is well established that the burden is on an employment discrimination plaintiff to establish a prima facie case of

discrimination." Mitchell v. Toledo Hosp., 964 F.2d 577, 582 (6th Cir.1992) (citations omitted). A plaintiff may establish a claim of disparate treatment in one of two ways--via indirect or direct evidence. First, a plaintiff may establish a prima facie case of discrimination by showing that (1) he was a member of a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position; and, (4) he was replaced by a person outside the class. Id, Talley v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241, 1246 (6th Cir.1995). If a plaintiffs claim is that a similarly situated non-minority was treated more favorably, the fourth prong of the test is altered, i.e., "a plaintiff can also make out a prima facie case by showing, in addition to the first three elements, that `a comparable non-protected person was treated better'." Mitchell, 964 F.2d at 582; Talley, 61 F.3d at 1246. Second, a plaintiff may alternatively establish her case "by presenting credible, direct evidence of discriminatory intent." Mitchell, 964 F.2d at 582 n.4.

In the absence of direct evidence, the court applies the familiar burden-shifting approach for inferential proof of discrimination set forth in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). While the burden of persuasion remains with the plaintiff, the burden of production shifts between the parties. The Sixth Circuit has described this approach as follows: "(1) the plaintiff must establish a prima facie case of racial discrimination; (2) the employer must articulate some legitimate, nondiscrimimtory reason for its actions; and (3) the plaintiff must prove that the stated reason was in fact pretextual." Harrison v. Metropolitan Gov't of Nashville and Davidson County, 80 F. 3d 1107, 1115 (6th Cir. 1996). In establishing pretext, the plaintiff

"may succeed ... either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256. However, in order to withstand summary judgment, a plaintiff must come forward with evidence demonstrating that the defendant's articulated nondiscriminatory justification is not true. Thurman v. Yellow Freight Sys., 90 F.3d 1160, 1166 (6th Cir.1996), amended on denial of reh g, 97 F.3d 833 (6th Cir.1996); Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1082 (6th Cir.1994). To make a case on the credibility of his employer's explanation, the plaintiff is required to show by a preponderance of the evidence (1) that defendant's proffered reasons for the adverse employment action had no basis in fact, (2) the proffered reasons did not actually motivate the action, or (3) the reasons were insufficient to motivate the adverse action. Manzer, 29 F.3d at 1082.

In the instant case, Plaintiff does not present any direct evidence of discrimination, and therefore, he must proceed with indirect evidence and the familiar burden shifting approach. Plaintiff claims that he was treated differently than similarly situated non-minority employees with respect to overtime opportunities, the handling of grievances regarding overtime, working overtime during the plant shut-down, his disciplinary actions, and the denial of a welding position. Because Plaintiff has failed to show that a "comparable non protected person was treated better," his claim for race discrimination based upon the theory of disparate treatment must fail. Mitchell, 964 F.2d at 582; Talley, 61 F.3d at 1246.

Plaintiff contends that during his employment at GM's Mansfield facility, he was regularly subjected to disparate treatment based upon his race–African-American. He

states that "a large number of overtime assignments were given to white employees over blacks, including [Plaintiff]." Plaintiff's Memo. Contra, p. 4. He further states that more overtime assignments were being awarded to "white employees working first shift than [to] second shift ... to avoid awarding overtime and commensurate pay to him." Memo. Contra, p. 3. Plaintiff also claims that "equalization of overtime" was not posted, as required, in his dent. In support of such contentions, Plaintiff makes several general, self-serving allegations. He fails, however, to provide sufficient evidence to support the same.

With respect to overtime hours and opportunities, the record reflects that Defendants followed the procedures outlined in the National Agreement and Local Agreement concerning equalization of overtime, "employee-on-the-job" assignments, and overtime hours posted. Plaintiff has failed to provide evidence that any of the above was executed in a racially discriminatory manner. Moreover, he fails to provide any evidence that a similarly situated non-minority person received more overtime hours when Plaintiff was otherwise entitled to the same.

Between March and June of 1999, Plaintiff filed approximately seven grievances, with the assistance of Local 549, relating to overtime. None of the grievances alleged discrimination with respect to overtime assignments or postings; rather, they alleged that GM failed to accurately record overtime hours. GM denied the allegations, and they were all settled with Local 549. As a result of one settlement, Plaintiff received 4.1 hours of back pay. In equalizing the overtime hours, and due to the difficulty in calculating the disputed 200 hours of back pay allegedly owed the ATB group, the hours were divided equally among the group members, regardless of

race. Plaintiff fails to show how such equalization treated a "comparable non-protected person" better than himself. Mitchell, 964 F.2d at 582; Talley, 61 F.3d at 1246.

The one individual with which Plaintiff attempts to compare overtime assignments is Gary Mills, the only other second-shift pipefitter, who is Caucasian. Plaintiff claims that Mr. Mills received more overtime assignments. The record reflects, through the overtime boards, that Mr. Mills, on occasion, had more overtime than Mr. May. However, the record reveals that the converse is also true, and Plaintiff sometimes had more hours than Mr. Mills. Plaintiff has failed to demonstrate that the equalization of such hours between Mr. Mills and Plaintiff were, at any time, in violation of the collective bargaining agreements or were racially motivated.

In one instance, Plaintiff filed a grievance wherein he claimed that the overtime board was off by approximately 77 hours (for 1997 and 1998). Committeeman Ferguson investigated the grievance and determined that Plaintiff may have been overcharged 43.5 hours. In an effort to equalize the hours and settle Plaintiff's grievance, Local 549 offered to charge Mr. Mills an additional 43.5 overtime hours. Plaintiff, dissatisfied with the outcome, refused such offer. Thereafter, Local 549 claimed that there was insufficient documentation to pursue Mr. May's claim any further, and it dropped the case. While Plaintiff may have been dissatisfied with such result, he has failed to put forth sufficient evidence establishing that the alleged discrepancy with overtime hours between Mr. Mills and Plaintiff was discriminatory or that the Union's handling of the matter was discriminatory.

Plaintiff appears to claim that GM discriminated against him with respect to certain disciplinary action taken. Throughout Plaintiff's tenure at GM's Mansfield facility, management observed Plaintiff intoxicated, or under the influence of alcohol, on at least three occasions. As a result, Plaintiff was disciplined. In January of 1998, he received a disciplinary layoff ("DLO") of one week. Pursuant to Local 549's involvement, the matter was settled, and Plaintiff's DLO was reduced to one week with three days suspended, with the discipline being removed from his record after six months. In November of 1998, management, once again, issued a DLO for Plaintiff's intoxication. And once again, with the assistance of Local 549, the DLO was reduced and removed from his record after six months. Plaintiff also received a DLO for leaving the plant without permission, and such DLO was reduced and would be removed from his record if he incurred no further violations within nine months. Finally, in July of 1999, having observed Plaintiff under the influence of alcohol once again, management issued a 30-day unpaid suspension to Plaintiff. Local 549 negotiated a settlement on Plaintiff's behalf, whereby Plaintiff's suspension was converted to a 30-day paid sick leave.

Plaintiff has failed to demonstrate how any of the above disciplinary actions were racially motivated. Nor has he shown how a comparable, non-protected person was treated better in like circumstances. In fact, Plaintiff has admitted that Caucasian employees have previously been disciplined for being intoxicated at work. Moreover, in each instance, Plaintiff's DLO was modified to Plaintiff's advantage.

Plaintiff also contends that the fact that he was not permitted to work overtime during the plant's 4th of July shutdown while he was on sick leave was discrimination.

This claim is entirely without support. Plaintiff provides no evidence that other employees were, in fact, permitted to work overtime hours while on sick leave, non-minority or otherwise. The fact that Plaintiff believed the sick leave was forced upon him is irrelevant while Plaintiff refused to sign the settlement, he did, in fact, accept the sick leave and the pay associated with such leave.

One final event which Plaintiff claims was racially motivated is the denial of a welding position. In June of 1999, GM posted a job opening for a gas/arc welder. Plaintiff and seven other employees applied. In the meantime, Plaintiff filed for reclassification of his card from pipefitter to welder. On August 19, 1999, Plaintiff was notified that he had been reclassified to welder. However, shortly thereafter, the Union revoked Plaintiff's welder card, stating that Plaintiff did not possess the requisite eight years welding experience; rather, Plaintiff erroneously calculated his plumber apprenticeship towards the welder card. While Plaintiff claims that such denial was due to his race, he fails to support the allegation with evidence that a similarly situated non-minority, with the same qualifications, was, in fact, hired. To the contrary, the record reveals that two Caucasian members of Local 549, Thomas Karbula and David Overt, who also applied for a journeyman card as a welder, were also denied a welder's card Moreover, the person who was awarded the gas/arc welder position, William French, was qualified for the position and had several more years seniority than Mr. May. Mr. French is not "similarly situated." See Ercegovich v. Goodyear Rubber & Tire Co., 154 F.3d 344, 352 (6th Cir.1998). Thus, Plaintiff's claim of disparate treatment must fail.

II. Hostile Work Environment Claim

Plaintiff also alleges that Defendants' actions created a hostile work environment. A hostile work environment occurs when the workplace is permeated with discriminatory intimidation, ridicule, and insult "that is sufficiently severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment..." Harris v. Forklift Sys., 510 U.S. 17, 21(1993); Faragher v. Boca Raton, 524 U.S. 775 (1998). In order to establish a prima facie case of hostile work environment based upon race, a plaintiff must demonstrate the following: (1) he is a member of a protected class; (2) he was subjected to unwelcome racial harassment; (3) the harassment was based upon race; (4) the harassment had the effect of unreasonably interfering with the employee's work performance by creating an intimidating, hostile, or offensive work environment; and (5) the existence of employer liability. See Hafford v. Seidner,183 F.3d 506, 512 (6th Cir.1999). The environment must be both objectively and subjectively offensive; in other words, the environment must be one that a reasonable person would find hostile or abusive and one that the victim, in fact, did perceive to be so. Harris, 510 U.S. at 21-22.

Plaintiff alleges in his Amended Complaint that the action and conduct of the Defendants created, and continue to create, a hostile environment for Plaintiff based upon his race. In support of such claim, Plaintiff states that he was denied overtime and overtime opportunities; he was disciplined; he was denied work during a plant shut-down; and he was denied a welding position. These allegations are essentially the same allegations made in support of Plaintiff's disparate treatment claim. Because Plaintiff fails to make a prima facie case of race discrimination with evidence of the

above, his claim that the same events establish a hostile work environment must also fail.

Furthermore, in considering all of the above allegations together, the same does not amount to a working environment that is so severe or pervasive as to alter Plaintiff's working conditions. See Harris, 510 U.S. at 21(1993); Faragher, 524 U.S. 775 (1998). Plaintiff cannot demonstrate that a reasonable person would find, in light of the evidence presented concerning overtime opportunities, that Plaintiff's working environment was intimidating, hostile, or offensive as to unreasonably interfere with his work performance. Rather, the record reflects that Plaintiff is generally responsible for his own interference, due, in large part, to his alleged substance abuse problem; and both GM and the Union went to great lengths to assist Plaintiff and to preserve his employment records with respect to the various disciplinary issues.

Plaintiff also sets forth three additional alleged incidents which Plaintiff contends constitute a hostile work environment. First, Plaintiff states that a derogatory cartoon was posted in the Mansfield plant without discipline. Plaintiff admits in his deposition that, after having complained to the Union, the cartoon was removed from the board on which it was posted. Second, Plaintiff states that a tag located on a piece of equipment contained a written notation: "worthless nigger." Other than learning that the incident was reported to management, he has no further knowledge about the derogatory notation. Finally, Plaintiff testified in his deposition that he, on three occasions, learned of a noose hanging in different locations throughout the plant. All incidents were reported either to plant security, management, or a union representative; and all nooses were removed.

While unfortunate, to say the least, the three aforementioned events do not establish that Defendants permitted a racially hostile work environment. Further, they do not demonstrate that Plaintiff's workplace was "permeated with intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter conditions of [Plaintiff's] employment" Harris, 510 U. S. at 21 (1993). Nor do such events arise to the level of an "abusive working environment" Id. Rather, while such derogatory language and pictures are undoubtedly offensive, taken as a whole, they are isolated incidents, and thus, are insufficient to create a hostile working environment. Therefore, Plaintiff has failed to establish a prima facie case of hostile work environment with the evidence presented in that he has failed to show that the alleged harassment had the effect of unreasonably interfering with his work performance by creating an intimidating hostile, or offensive work environment.

III. Breach of Contract Claim

Finally, Plaintiff alleges in his Fifth Claim of the Amended Complaint that the actions and conduct of Defendants UAW International and UAW Local 549, as outlined previously, constitute a breach of contract. Specifically, Plaintiff claims, in violation of the National Agreement and Local Agreement, that: he was entitled to, and denied, additional overtime within his department; he was entitled to, and denied, additional overtime within the ATB group; and he was denied the opportunity to work during the plant shut-down. Plaintiff claims that Local 549's failure to process his overtime grievances with respect to such overtime constituted a breach of the Agreements.

As previously stated, Plaintiff worked under a series of collective bargaining agreements negotiated between

GM and UAW known as the National Agreement, entered. into by GM and the UAW International, and the Local Agreement, entered into by GM and UAW Local 549. Such agreements establish the working conditions of UAW members employed by GM, including the rights and the responsibilities of the parties. Because Plaintiff's employment is governed by a collective bargainning agreement, this complaint is a hybrid Section 301 claim, and the Labor Management Relations Act ("LMRA")applies. See 29 U.S.C. § 185(a); Fox v. Parker Hannifin Corp., 914 F.2d 795, 799 (6th Cir.1990). The United States Supreme Court has read Section 301 to include individual collective bargaining workers' claims. Fox, 914 F.2d at 799 (citations omitted). Section 301 preempts only state law claims that are `substantially dependent on analysis of a collective-bargaining agreement...'" Id (citations omitted).

A hybrid Section 301 lawsuit "implicates the interrelationship among a union member, his union, and his employer." Vencl v. International Union of Operating Engineers, Local 18,137 F.3d 420, 424 (6th Cir.1998)(citing White v. Anchor Motor Freight, Inc., 899 F.2d 555, 561 (6th Cir.1990)). Under Section 301, jurisdiction exists when a union member alleges a breach of a collective bargaining agreement. See 29 U.S.C. § 185(a). In order to recover against a union under Section 301, the union member must prove the following: (1) that the employer breached the collective bargaining agreement; and (2) that the union breached its duty of fair representation. White, 899 F.2d at 559. The employee, therefore, must necessarily demonstrate both violations, or he cannot succeed against either party. Vencl,137 F.3d at 424. "[T]he validity of any hybrid 301 claim is anchored as equally in a finding that the union has breached its duty of fair representation as it is in a finding that the collective bargaining agreement has

been breached and that an arbitrator or its equivalent erroneously failed to rule in favor of the grievant employee." White, 899 F.2d at 560.

As dictated by the United States Supreme Court in Vaca v. Sipes, 3 86 U.S. 171,190 (1967), a breach of the duty of fair representation ("DFR") occurs only when a union's conduct toward a member of the collective bargaining unit is "arbitrary, discriminatory, or in bad faith." In father limiting the application of such claims, the Sixth Circuit has held that the duty of fair representation is implicated only when an individual or group is treated differently by a union-either through discriminatory, bad faith, or arbitrary conduct--than another individual or group. See NLRB v. Local 299, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 782 F.2d 46, 52-53 (6th Cir.1986).

In the instant case, Plaintiff failed to establish that the Union's actions with respect to his overtime hours or the handling of his grievances concerning the overtime were "arbitrary, discriminatory, or in bad faith." Vaca, 386 U.S. at 190. Thus, Plaintiff has failed to demonstrate that either UAW International or UAW Local 549 has breached its duty of fair representation.

With respect to the departmental overtime issue, Local Union Committeeman Craig Ferguson met numerous times with Mr. May in attempts to investigate the grievance and negotiate a settlement. The Union proposed a settlement upon discovering that Plaintiff may have been overcharged 43.5 hours. The Union offered to charge the remaining pipefitter, Mr. Mills, an additional 43.5 hours in order to equalize the time between the two gentlemen. Mr. May refused the offer. In its discretion, and as a result of the alleged lack of

evidence on Mr. May's part, Local 549 dropped the case. Plaintiff failed to provide evidence that Local 549's dropping such case was discriminatory or arbitrary in some manner. The grievances, in fact, filed in the summer of 1999, related to overtime issues commencing as far back as 1997 and 1998. Unions maintain wide discretion "to act in what they perceive to be their members' best interests." Peterson v. Kennedy, 771 F.2d 1244, 1253 (9th Cir.1985).

With respect to the ATB group overtime grievance, Mr. May was included in the group grievance. Committeeman Ferguson investigated allegations of violations of the equalization of overtime pay within the group, and he filed grievances on behalf of the members accordingly. Following the investigation, GM and Local 549 negotiated a settlement whereby approximately 200 hours of back pay were divided among the approximately 49 members of the group. The Union determined that calculation of the hours would be too difficult. Thus, Plaintiff received 4.1 hours of back pay as a result of the settlement. While Mr. May was dissatisfied with the settlement, his dissatisfaction is not a basis for his claims that Local 549 acted arbitrarily or discriminatory. The fact that the hours were divided equally among the members, regardless of their race, demonstrates that the settlement was effected in a non-discriminatory fashion. Once again, Local 549 exercised its discretion in negotiating the best settlement it could in the best interests of its members.

Plaintiff also objects to the actions of Union defendants with respect to the 4th of July plant shut-down. Plaintiff claims that he was denied overtime opportunity during this time because he took an "involuntary" sick leave. However, the Union did not pursue any claims for lack of overtime work at this time due to the fact that Local

549 had negotiated a settlement on behalf of Plaintiff whereby Plaintiff would be required to take a 30-day paid sick leave rather than a 30-day unpaid suspension. Employees on sick leave are not permitted to work overtime. While Mr. May may have objected to the initial discipline and refused to sign the Settlement Agreement entered into between GM and Local 549, he agreed to take the sick leave. In light of the above actions taken by the Union on Plaintiffs behalf (in negotiating an unpaid suspension into a paid sick leave), Plaintiff cannot establish that such conduct was discriminatory or made in bad faith when the ultimate outcome was to Mr. May's advantage. This is especially true in light of the fact that Plaintiff admitted that he needed the money during that 30-day time period.

Based upon the above, Plaintiff has failed to show that Defendant UAW International or UAW Local 549 has acted in a discriminatory or arbitrary fashion. Therefore, he cannot show that the Union breached the duty of fair representation owed to its members. Accordingly, Plaintiff cannot establish a claim for breach of contract against the Union Defendants, as a union member in a Section 301 action must establish both breach of the collective bargaining agreement and breach of its duty of fair representation in order to maintain such action.

Conclusion

For the reasons stated above, the Court finds there are no genuine issues of material fact which remain to be litigated on all counts of Plaintiff's Amended Complaint. Accordingly, Defendants UAW International and UAW Local and GMC's Motions for Summary Judgment (ECF #30, #31) are GRANTED.

IT IS SO ORDERED.

s/Donald C. Nugent
DONALD C. NUGENT
United States District
Judge

DATED: April 29, 2002

FOOTNOTES

[1] The factual summary is based on the parties' statements of facts. Those material facts which are controverted and supported by deposition testimony, affidavit, or other evidence are stated in a light most favorable to Plaintiff, the non-moving party.

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No. 03-220

IN THE

Supreme Court of the United States

ALLEN LEE MAY,

Petitioner,

v.

GMC MANSFIELD METAL FABRICATING; UAW INTERNATIONAL; UAW LOCAL 549,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS INTERNATIONAL UNION UAW AND UAW LOCAL 549 IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
ARGUMENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI	4
A. Petitioner Has Failed To Demonstrate Compelling Reasons For A Writ Of Certiorari To Be Granted	4
B. The District Court And The Sixth Circuit Correctly Found That The Petitioner Had Not Established A *Prima Facie* Case Due To His Failure To Show He Was Qualified	5
C. Petitioner Failed To Show He Had Suffered An Adverse Employment Action By The Denial Of A Transfer	9
D. Petitioner Has Made No Showing To Justify The Court Revisiting The Well-Established *McDonnell-Douglas* Standards In Employment Discrimination Cases	11
CONCLUSION	12

TABLE OF AUTHORITIES

CASES	Page
Desert Palace v. Costa, 123 S.Ct. 2148 (2003)	11
Dobbs-Weinstein v. Vanderbilt University, 185 F.3d 542, 545-46 (6th Cir. 1999)	10
Fortier v. Ameritech Mobile Communications, 161 F.3d 1106, 1111-12 (7th Cir. 1998)	10
Galabya v. New York City Board of Education, 202 F.2d 636 (2nd Cir. 2000)	10
Herrinriter v. Chicago Housing Authority, 315 F.3d 742 (7th Cir. 2002)	10
Kocsis v. Multicare Management, 97 F.3d 876, 886-87 (6th Cir. 1996)	10
McDonnell Douglas v. Green, 411 U.S. 792 (1973)	*passim*
Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977)	11
Reeves v. Sanderson Plumbing Productions, 530 U.S. 133 (2002)	7
Sanchez v. Denver Public Schools, 164 F.3d 527, 532 (10th Cir. 1998)	10
St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993)	6, 11
Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-253 (1981)	6, 9

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STATEMENT OF THE CASE

Allen Lee May has been employed by the General Motors Corporation (GMC) since 1980 in the skilled trades classification of pipefitter. During this period he has been a member of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW/Union), most recently Local Union 549 in Mansfield. During his employment May has worked under a series of collective bargaining agreements negotiated between GMC and the UAW.

May filed his action against his employer, GMC, and his union, UAW Local 549 and its parent, the International Union UAW, alleging violations of Title VII, 42 U.S.C.

2000(e) *et seq*, 42 U.S.C. 1981, state fair employment practices, breach of contract and breach of the duty of fair representation, under section 301 of the Labor Management Reporting Act, 29 U.S.C. 185. May claimed discrimination on the basis of race with regard to GMC's failure to award him the position of gas/arc welder, a lateral transfer from his skilled trades position of pipefitter, and the Union's failure to approve a journeyman welder's card to replace his pipefitter's card. (Petitioner's Brief p. 1).

At the Mansfield facility, GM employs production workers on the assembly line; maintenance workers who perform general repair and maintenance work; as well as skilled tradesman who work in specialty areas such as carpentry, welding, tool and die, and others. During his entire career at GM Mansfield, May has worked as a skilled tradesman in the pipefitter specialty classification. May, believing that the skilled trades' classification of *welder* afforded him more overtime than a *pipefitter*, looked for a transfer opening. (Petitioner's Brief p. 16). On June 17, 1999 GMC posted a job opening for a journeyman die welder and journeyman gas/arc welder, for which May and seven other employees applied.

May filed for reclassification of his journeyman card from *pipefitter* to *welder*, since the opening involved the welder's trade. This application was processed by the UAW, according to the National Agreement between GMC and the UAW, involving approval steps at the local level and at the national level by the UAW Skilled Trades Department in Detroit. Although initially granting the request to transfer, the UAW reconsidered upon the submission of information from its Local 549 in Mansfield that May lacked experience and training as a welder.

The UAW Skilled Trades Department has a policy that the trades of Pipefitter and Welder are separate and distinct, established by the UAW Executive Board and its Skilled

Trades Advisory Committee, as reflected in the ATB Memorandum between Local 549 and GM, where pipefitter and welder are listed as separate trades. Consequently, years of experience in pipefitting and plumbing are not counted toward the years of experience needed for welding.

The Skilled Trades Department ultimately concluded that May had not worked at the trade of welder maintenance for eight years; did not meet the minimum qualifications, and thus was not entitled to a welder's card. He did, however, retain his journeyman card as a pipefitter, entitling him to continue to work in that skilled trades classification. In addition, the work experience May submitted in support of his welder card had earlier been submitted for a pipefitter card. Where the two trades are considered separate and distinct, as here, years of training and experience cannot be submitted to support both.

At the time when May was seeking reclassification of his pipefitter's card, the Skilled Trades Department was processing the applications for a journeyman welder card of two Caucasian members of Local 549, Thomas Karbula and David Wert. Even though these members had worked at a non-UAW facility as May, the UAW demanded documentary proof in the form of W-2s of eight years experience. The Skilled Trades Department considered the proof submitted as insufficient, and rejected their applications for a welder's card.

GMC awarded the welder position to a Caucasian male, William French, in accordance with the collective bargaining agreement that requires open positions be filled internally to the qualified employee with the most seniority. French carried a seniority date of July 12, 1965; whereas May's was December 13, 1983.

At the conclusion of discovery, supported by Affidavits of Local Union representatives and Skilled Trades represen-

tatives of the International Union, the UAW International Union and UAW Local 549 filed motions for summary judgment. GMC filed a Motion for Summary Judgment, supported by an Affidavit of a Labor Relations Analyst, with voluminous records. May opposed the motions, supported by his own deposition and Affidavit. The District Court granted summary judgment, holding that May failed to establish a prima facie case under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). May was not treated differently from similarly situated non-class members, for Mr. French who was awarded the welder's position, had a journeyman welder's card and had more seniority than he had. (District Court Opinion pp. 17-18). The Sixth Circuit affirmed, concluding May failed to show disparate treatment because the position was filled by an individual who, unlike May, was qualified and had more seniority than May.

ARGUMENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari in this case is without merit for a number of reasons. First, Petitioner has failed to demonstrate compelling reasons, as required by the Court's rules, for the grant of a Writ of Certiorari. Second, the District Court and the Court of Appeals correctly found that Petitioner was not qualified for the position he sought via transfer and that dismissal of the case by summary judgment motion was proper. Third, the denial of a transfer from one skilled trade position to another was not an adverse employment action. Fourth, Petitioner's contention that the well-established rules of the *McDonnell Douglas* cases should be revised by this Court is without support.

A. Petitioner Has Failed To Demonstrate Compelling Reasons For A Writ Of Certiorari To Be Granted

Petitioner has not articulated any "compelling reasons" for this Court to grant a writ of certiorari, as required by Rule 10

of the Rules of the Supreme Court of the United States. The decision of the Sixth Circuit Court of Appeals does not conflict with another federal court of appeals decision on the same matter, does not conflict with a state court of last resort on a question of federal law, and does not conflict with or otherwise depart from the accepted and usual course of judicial proceedings or sanction such a departure by a lower court. The Sixth Circuit's decision did not decide an important issue of federal law which requires further settlement by this Court, nor does its decision conflict with a prior decision of this Court.

B. The District Court And The Sixth Circuit Correctly Found That The Petitioner Had Not Established A *Prima Facie* Case Due To His Failure To Show He Was Qualified

Petitioner does not contend that the Sixth Circuit and the District Court incorrectly applied well-settled law. The road map to analyze a case of indirect discrimination under Title VII has been well paved and consistently reinforced. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court established the allocation of the burden of production and the order of the presentation of proof in Title VII discriminatory treatment cases. The complainant must carry the initial burden of establishing a prima facie case that varies slightly depending on whether the claim is one for discriminatory discharge or other adverse employment decisions. This case is established by the fourfold test: showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *See McDonnell Douglas*, 411 U.S. at 802.

The Court established a burden-shifting process between the plaintiff and defendant, with the plaintiff bearing the burden of persuasion on the elements on the prima facie case. If the plaintiff succeeds in establishing the prima facie case, then the defendant must articulate some legitimate non-discriminatory reason for the employer's rejection. After the defendant articulates a reason, the plaintiff then has the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *See McDonnell Douglas*, 411 U.S. at 802-803. *See also Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-253 (1981). Even though the burden shifts to the defendant to articulate some reason, Title VII does not obligate employers to show the person selected was more qualified than the plaintiff; the plaintiff has the ultimate burden of showing that he/she was the victim of intentional discrimination. *See Burdine*, 450 U.S. at 256.

For thirty years now, the *McDonnell Douglas* prima facie case has remained a clear and consistent beacon for the courts to follow. In the last ten years however, the burden shifting between the plaintiff and the defendant has been refined. In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), the Court clarified the burden on the defendant on presentation of its legitimate business reasons, where its burden is discharged if defendant produces evidence which taken as true would permit the conclusion that there was a nondiscriminatory reason for the adverse action. If the plaintiff fails to rebut the prima facie case with such evidence, the Court must then award judgment as a matter of law. Where the defendant discharges his burden of production, the *McDonnell Douglas* framework is no longer relevant. The fact finder must then look to the ultimate question: whether defendant intentionally discriminated against the plaintiff. *St. Mary's Honor Center*, 509 U.S. at 510-511.

In *Reeves v. Sanderson Plumbing Productions*, 530 U.S. 133 (2002), the Court revisited pretext and the burden remaining on the plaintiff. The Court held that the fact finder's rejection of the employer's legitimate nondiscriminatory reason for its action does not compel judgment for the plaintiff. The ultimate question is whether the employer intentionally discriminated against the plaintiff. *See Reeves*, 530 U.S. at 147. The Court recognized however that it was permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Proof that the employer's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination. Thus, the Court concluded "a plaintiff's prima facie case combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.*, 530 U.S. at 147-48.

The Court below carefully and correctly followed the *McDonnell Douglas* four-part test to show a prima facie case as well as the burden shifting allocation of proof. Analyzing May's claim that his application for his journeyman welder's card as well as for the welder's position was a promotion case, it found that May did not satisfy the second prong of the *McDonnell Douglas* prima facie case by failing to prove that he was qualified. (Jt. App. 3a.) In addition, the employer showed that it had a legitimate business interest not to award him the position, for the person it selected had more seniority than May. Thus, it was following the collective bargaining agreement between itself and the UAW.

The Court credited the evidence of the UAW Skilled Trades that eight years experience in the trade was a necessary qualification. The Court found May was not qualified to have his pipefitter card reclassified to a welder card, for he did not work eight years in welding as

required for the card. Furthermore, he erroneously calculated his plumber apprenticeship years as counting toward the eight years required for the welding card. (District Court Decision pp. 17-18.) May's only response was that the decision making process was tainted when the UAW reconsidered its own decision upon the submission of additional evidence from Local 549. The consideration of additional evidence does not indict the process but rather fortifies it. At no time did May submit evidence that the eight years experience was not a qualification. Nor did he submit evidence that the eight-year qualification was not required for non-minority applicants.

May argues that the award of the welder's position to fellow employee French who had more qualifications than he was pretextual. Even though GMC produced evidence that French had a welder card and had more seniority than May, he objected to the nature of the proof. Again, he fails to recognize that the burden showing he was qualified and other non-minorities were treated differently is his burden rather than the employer's. (See Petitioner's Brief, pp. 20; 21-22). The Court rejected the pretext claim finding "the position was filled by an individual who, unlike May, was qualified and had more seniority than May." (Jt. App. 3(a))

A variation on the pretext theme is plaintiff may show that similarly situated employees outside the plaintiff's protected group received favored treatment. *See McDonnell Douglas*, 411 U.S. at 804. May failed to show that he was treated differently than similarly situated non-minority applicants. Two non-minority members of his Local also applied for their journeyman welder card and were denied the position.

The Courts below, thus properly applied the four-step process in establishing a prima facie case under *McDonnell Douglas*, and they properly concluded that May had not met his burden of showing that he was "qualified" for the welder's position he was seeking or the journeyman

welder card. They found May did not meet his burden of establishing a prima facie case. If he did, he failed to show the legitimate reasons produced by the UAW were a pretext.

Having failed to meet his burden, May in the alternative, argues that the Court below made a factual determination about his qualifications due to the fact that the UAW initially allowed the reclassification of his card (Petitioner's Brief, pp. 17-19.) A factual dispute was not presented because May failed to produce any evidence that the decision made by the UAW to deny his reclassification was pretextual. The unrefuted evidence in the record was that the eight years were required and that years in one trade could not be counted as years for another trade. As noted in *Burdine*, the defendant is not required to prove that the person promoted was more qualified than the plaintiff. It is the burden of the plaintiff to show that similarly situated employees were not treated equally. May has failed in his burden as the Court below noted.

C. Petitioner Failed To Show He Had Suffered An Adverse Employment Action By The Denial Of A Transfer

Although the record below is undisputed that May held a journeyman card as a pipefitter and was merely seeking a transfer to a welder's card, the Court treated the facts as a promotion case. The Court also had evidence May failed to establish an element of the fourfold test that he suffered an adverse employment action. Title VII does not forbid every act of invidious discrimination that an employer might commit against an employee; the action must be taken with respect to the employee's compensation, terms, conditions or privileges of employment, 42 USC 2000 Paragraph e-2(a). Such an event has been established where there is a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly

different responsibilities, or a decision causing a significant change in benefits", *Herrinriter v. Chicago Housing Authority*, 315 F.3d 742 (7th Cir. 2002).

Adverse employment actions include terminations, demotions, loss of salary or benefits or materially adverse changes in working conditions. *Kocsis v. Multicare Management*, 97 F.3d 876, 886-87 (6th Cir. 1996) and *Dobbs-Weinstein v. Vanderbilt University*, 185 F.3d 542, 545-46 (6th Cir. 1999). *See also Galabya v. New York City Board of Education*, 202 F.2d 636 (2nd Cir. 2000) (no adverse employment action where transfer from one school to another without loss of benefits, prestige, or opportunities for advancement); *Fortier v. Ameritech Mobile Communications*, 161 F.3d 1106, 1111-12 (7th Cir. 1998); *Sanchez v. Denver Public Schools*, 164 F.3d 527, 532 (10th Cir. 1998) (no adverse employment action where failure to transfer teacher from one position to another a lateral transfer without reduction in wages or benefits).

Here May has not met his burden of showing an adverse employment action. When he was transferred to Mansfield in 1997 he was employed in the pipefitter classification, holding a journeyman card as pipefitter. As such, he was working in a skilled trades position of a pipefitter, a position considered better than a rank and file production worker. When the UAW initially denied May's application and transfer of his journeyman card from a pipefitter to a welder card, May suffered no adverse employment action. He retained his journeyman card as a pipefitter, and his employment at GMC. His speculation that he could receive more overtime as a welder does not change this conclusion.

D. Petitioner Has Made No Showing To Justify The Court Revisiting The Well-Established *McDonnell-Douglas* Standards In Employment Discrimination Cases

In his last gasp, May requests that the Court entirely overturn or "soften" the *McDonnell Douglas* standards for establishing the prima facie case as well as the allocation of shifting of burdens, because the framework puts too much of a burden on the Plaintiff; justice and public policy demand it. (Petitioner's Brief, p. 24.) As a result, Plaintiffs have encountered difficulty in engaging an attorney to represent them and they encounter many obstacles in their pursuit of justice. As here, May believes "justice is lost in the Court's granting of the employer's Motion for Summary Judgment" (Petitioner's Brief, p. 26.) May has invoked justice when he should have cited statutes, decisions from other jurisdictions and/or academic research.

Contrary to Petitioner's assertions, *McDonnell Douglas* is not an overly burdensome or unjust standard for a Plaintiff to satisfy. The framework has been a bedrock of consistency in a sea of judicial change that has occurred over the last thirty years in labor and employment law. Most Title VII cases are very fact oriented, and the framework developed has resulted in providing a tool by which courts can analyze these diverse situations.

This model has been flexible by incorporating concepts of other labor employment statutes in to which develop. In *Desert Palace v. Costa*, 123 S.Ct. 2148 (2003), it borrowed from mixed motive cases under 42 USC 1983, *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). The Court itself in its opinions under Title VII construing its burden have shown remarkable consistency with the exception of the refinements of "pretext" in *St. Mary's Honors Center v. Hicks*, *supra*; *see also Desert Palace* and *Sanderson*, *supra*.

Petitioner's argument for revisiting these standards is entirely to obtain a different result in the present case. Petitioner cannot simply allege that minorities have difficulties in engaging counsel to represent their interests. He needs to show more than some Title VII plaintiffs have encountered difficulty winning a case at the District Court or Court of Appeals level. He has failed to show more than a hope and a prayer.

In this case, it is doubtful that May suffered an adverse employment action. The proof submitted by Plaintiff did not meet his burden under the established *McDonnell Douglas* test. And the courts are not at a crossroads where they should consider disturbing that bedrock of Title VII law.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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No. 03-220

In The Supreme Court of the United States

ALLEN LEE MAY,

Petitioner,

v.

GMC MANSFIELD METAL FABRICATING; UAW INTERNATIONAL; UAW LOCAL 549,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT GMC MANSFIELD METAL FABRICATING IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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14 pp

TABLE OF CONTENTS

		Page
I.	STATEMENT OF THE CASE	1
II.	REASONS FOR DENYING THE PETITION	6
	A. Certiorari Is Unwarranted Because The Sixth Circuit Correctly Applied This Court's Precedents In Disparate Treatment Cases	7
	B. Certiorari Is Unwarranted Because The Sixth Circuit Correctly Applied This Court's Precedents In Hostile Work Environment Cases	9
	C. Petitioner Has Not Provided Any Justification For Revisiting Its Well-Established Standards In Title VII Cases	11
III.	CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

Faragher v. Boca Raton, 524 U.S. 775 (1998) 10

Harris v. Forklift Sys., 510 U.S. 17 (1993) 10

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).....8, 9, 11

Patterson v. McLean Credit Union, 491 U.S. 164 (1989)..... 8

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1991)..... 8

I. STATEMENT OF THE CASE

This action was instituted by Petitioner Allen Lee May against his current employer General Motors Corporation ("GM") and his Union (the UAW International and UAW Local 549), alleging causes of action for: (1) race discrimination against GM and the Union under 42 U.S.C. §1981; (2) race discrimination against GM and the Union under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e, *et seq.* ("Title VII"); (3) race discrimination against GM and the Union under Ohio Revised Code Chapter 4112 (Ohio's anti-discrimination statute); (4) and breach of contract against the Union.

The facts presented to the United States District Court for the Northern District of Ohio, Eastern Division, and the United States Court of Appeals for the Sixth Circuit are straightforward. The District Court accurately restated these facts in its Decision. [Petition Appendix pp. 9a-17a]. On October 26, 1983, General Motors hired Petitioner, as a journeyman pipefitter, at its facility in Pontiac, Michigan. Petitioner continued to work for GM over the next fourteen years at several GM facilities in Michigan and New York. In April 1997, Petitioner applied for and received a transfer to GM's Metal Fabrication facility, in Mansfield, Ohio ("the Mansfield Facility"). All of the allegations in the instant action relate to Petitioner's employment at the Mansfield facility. Briefly stated, Petitioner alleges that he was denied the opportunity to work overtime, disciplined, required to attend alcohol rehabilitation, denied the opportunity to work during shut down, and denied a welding position, all on the basis of his race. Petitioner also claims that he experienced a racially hostile work environment while working at the Mansfield facility.

As noted, Petitioner alleges that he was denied the opportunity to work overtime on account of his race. However, equalization of overtime among employees at the Mansfield facility is governed by several contractual provisions in the National Collective Bargaining Agreement between GM and the UAW International ("the National Agreement") and the Local Agreement between GM and UAW Local 549 ("the Local Agreement"). GM was required to equalize overtime as much as practicable between Petitioner and Gary Mills, the other second shift pipefitter in Petitioner's group. Petitioner claims that Mills, who is Caucasian, was given the opportunity to work more overtime.

Overtime boards are posted within each department at the Mansfield facility, so that all employees may review their standing. Although Petitioner alleges that he was shorted 200 hours of overtime in 1999, the overtime boards do not show a difference of 200 hours, or any other significant difference, between Petitioner and Mills. A review of the overtime boards from March through June of 1999 shows that sometimes Petitioner had more overtime hours than Mills, and sometimes Mills had more overtime hours than Petitioner, but the two were always within close range of each other. Overtime hours are rarely exactly equal.

Petitioner also claims that he was disciplined on account of his race. In this regard, the facts show Petitioner was disciplined on the following occasions. On January 13, 1998, Petitioner reported to work at his regularly scheduled time. The Company was notified by plant security that Petitioner was observed staggering into the facility. Members of GM management and UAW Local 549 officials also had an opportunity to observe Petitioner

and determine that he was under the influence of alcohol. When Petitioner returned to work on January 16, 1998, GM issued a disciplinary layoff ("DLO") of one week plus the balance of the shift for reporting to the plant under the influence of alcohol and in an unsafe condition. The discipline was later modified, as part of a settlement between the Company and the UAW Local 549.

Several months later, on November 2, 1998, Petitioner attempted to gain access to the plant through security. Again, plant security reported to the Company that Petitioner's speech was slurred, and that his balance was unstable. Petitioner was observed by GM management in what appeared to be an intoxicated state and was denied access to the plant. Petitioner was issued a DLO of one week for reporting to the plant under the influence of alcohol and in an unsafe condition. The discipline was later modified as part of a settlement between the Company and the UAW Local 549.

Two months later, on January 29, 1999, Petitioner got into an altercation with his supervisor, John Clark, who instructed Petitioner to report to Labor Relations. However, instead of doing so, Petitioner left the plant and went home. On February 1, 1999, Petitioner was given a two-week DLO for leaving the plant during working hours without permission. Once again, the discipline was modified, due to a settlement between the Company and the UAW Local 549, and Petitioner served a DLO of the balance of shift and three days. Pursuant to the settlement, the discipline would have been removed from Petitioner's record after nine months if he had no further rule violations during that time period.

Next, Petitioner claims that he was required to go on sick leave and participate in an alcohol rehabilitation program on account of his race, and that he was denied the opportunity to work during the shut down while on sick leave. On July 1, 1999, Petitioner's Supervisor, John Clark, and General Supervisor, Pete Lang, observed Petitioner and concluded that he was under the influence of alcohol, as a result of the odor of alcohol on his breath, his slurred speech, and his general mannerisms. Clark suspended Petitioner for being under the influence of alcohol and in an unsafe condition, and requested that Petitioner report to Labor Relations on July 2, 1999, for a disciplinary interview.

At the disciplinary interview, Petitioner was informed that he was being given a thirty-day suspension for being intoxicated at work. The thirty-day suspension was mandated because Petitioner's February 1, 1999 discipline was still on his record. Despite Petitioner's disciplinary history and obvious problems with alcohol, UAW Local 549 officials convinced the Company to work out a settlement, under which Petitioner was permitted to take a thirty-day paid sick leave, in lieu of the thirty-day suspension, on the condition that he attend an alcohol rehabilitation program and follow-up counseling. Petitioner denies that he has a problem with alcohol, but admits that the Company honestly believed that he was intoxicated at the plant. Petitioner agreed to the settlement and attended a rehabilitation program in Michigan, which was paid for by his GM benefits.

During Petitioner's sick leave, the Mansfield plant shut down its operations, as it does every July. Employees may apply for work during times of plant shutdown, as some work is still being performed. However, employees on

sick leave are not eligible to work during the shutdown. Petitioner understood when he agreed to settlement that he would not be able to work during a shutdown.

Finally, Petitioner claims that he was denied a welding position on account of his race. On June 17, 1999, the Mansfield facility posted job openings for a journeyman die welder and a journeyman gas/arc welder. On June 18, 1999, Petitioner and seven other employees applied for the gas/arc welder position. Open positions that are filled internally are awarded to the qualified employee with the most seniority who applies for the position. William French was awarded the gas/arc welder position. Even if Petitioner had been qualified for the position, he would not have been awarded it because French, with a seniority date of July 12, 1965, had far more seniority than Petitioner, whose seniority date is December 13, 1983. In any event, Petitioner was not qualified for the gas/arc welding position because he was not classified as a journeyman welder and did not have a journeyman welder card from the UAW. Without a journeyman welder card, the Company could not award Petitioner the gas/arc welder job that he applied for, regardless of his seniority.

Petitioner's hostile work environment claim is based on the same allegations asserted in support of his disparate treatment claim. Additionally, Petitioner points to three incidents that he claims establish a racially hostile work environment. First, Petitioner claims that there was a racially offensive cartoon posted on one of the bulletin boards at the plant. When Petitioner noticed the cartoon, he complained to the Union (not to the Company), and in any event, it was immediately taken down. Second, Petitioner points to the tag which was allegedly placed on coworker Billy Feagin's scooter, which said "worthless

nigger". However, Petitioner has no knowledge regarding who was responsible for the tag, whether there was an investigation, or whether the Company disciplined anyone. Third, Petitioner alleges that he learned of a noose hanging in different locations throughout the plant, but he concedes that they were taken down after being reported to the Company or the Union.

Following discovery, Respondents filed Motions for Summary Judgment, which were opposed by Petitioner. On April 29, 2002, the District Court issued an Opinion and Order dismissing Petitioner's claims. Petitioner timely filed his Notice of Appeal to the United States Court of Appeals for the Sixth Circuit. On March 20, 2003, the Sixth Circuit issued a Memorandum Opinion and Order affirming the judgment of the District Court. Thereafter, Petitioner filed the instant Petition. For the reasons presented below, Respondent GM respectfully submits that the Court deny the Petition.

II. REASONS FOR DENYING THE PETITION

The Petition presents no issue meriting this Court accepting certiorari jurisdiction. Pursuant to Supreme Court Rule 10, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." "[A] petition for a writ of certiorari will be granted only for compelling reasons," such as where:

> A state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with the relevant decisions of this Court.

Sup. Ct. R. 10.

Petitioner has cited no legal authority to support his argument that this Court should accept this case for review, nor any reason to set this case apart from any other race discrimination case. Petitioner has cited neither contrary legal authority in the Sixth Circuit nor a split among the Circuits that would justify this Court allocating time on its limited docket to consider this routine race discrimination case. In fact, Petitioner's argument for review is simply a rehash of his already rejected arguments as to why the District Court's decision was incorrect. Petitioner does not claim that the lower Court applied an incorrect legal standard. Rather, he merely disagrees with its application of the facts. However, mere disagreement with a lower court decision is not grounds for Supreme Court review.[1]

A. Certiorari Is Unwarranted Because The Sixth Circuit Correctly Applied This Court's Precedents In Disparate Treatment Cases.

The standards to be applied in analyzing a case of indirect discrimination under Title VII are well established, and Petitioner does not claim that the District Court or Sixth Circuit applied an incorrect legal standard. Disparate treatment cases are subject to the following tripartite analysis: (1) the plaintiff must establish a *prima facie* case of discrimination; (2) only then does the burden shift to the defendant to articulate a legitimate non-discriminatory reason for its actions; and (3) if it does, the

[1] Supreme Court Rule 10 provides: "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

plaintiff must then prove that the reason offered is, in fact, a pretext for discrimination and that intentional discrimination motivated the action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801-802 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256-258 (1991).[2]

Here, Petitioner does not claim to have any direct evidence of race discrimination. In order to establish a *prima facie* case of race discrimination, Petitioner was required to show that: 1) he is a member of a protected class; 2) he was subjected to adverse employment actions; 3) he was qualified for the position in question; and 4) he was replaced by a nonprotected person or similarly situated nonprotected employees received preferential treatment. *McDonnell Douglas*, 411 U.S. at 802. The lower Courts found that Petitioner could not establish a *prima facie* case of race discrimination. Therefore, it was unnecessary to determine whether Petitioner could show that GM's legitimate, non-discriminatory reasons for its actions were a pretext for race discrimination.

Specifically, the District Court and Sixth Circuit correctly noted that Petitioner presented no evidence that he was treated less favorably than similarly situated nonminority employees at the Mansfield facility. There is simply no evidence that Mills received more overtime than Petitioner, because the overtime records indicated that overtime was equalized between the two employees.

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[2] This Court has held that claims for race discrimination under 42 U.S.C. §1981 are analyzed under the same evidentiary framework enunciated by the federal courts for race discrimination claims under Title VII. *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989).

Petitioner is also unable to establish that GM's disciplinary actions toward him were racially motivated because there is no evidence that comparable Caucasian employees were treated better in like circumstances. In fact, Caucasian employees at the Mansfield facility were also disciplined for being under the influence of alcohol. Likewise, there is no evidence that any other non-minority employees on sick leave were ever permitted to work during the shutdown. Finally, the lower Courts found that Petitioner was unable to establish a *prima facie* case based on being denied the welder position because he was not qualified for the position, and the employee that was awarded the position was not similarly situated to Petitioner because he was qualified and had several more years seniority.

The Courts below properly applied the four-step process of establishing a *prima facie* case under *McDonnell Douglas*. Petitioner cannot argue that the lower Courts failed to follow this Court's well-established precedent. Instead, he argues that the lower Courts did not scrutinize the facts and improperly resolved factual disputes in favor of Respondents. As discussed above, Petitioner is not entitled to this Court's review only to rehash the evidence presented in this case. Petitioner also claims to have evidence of pretext. However, this argument is pointless because the Courts below were not required to consider pretext given that Petitioner could not establish a *prima facie* case.

B. Certiorari Is Unwarranted Because The Sixth Circuit Correctly Applied This Court's Precedents In Hostile Work Environment Cases.

Like the legal standards for disparate treatment cases under Title VII, the standards for analyzing hostile work

environment cases have also been previously established by this Court. In order to establish a *prima facie* case of hostile work environment based on race, a plaintiff must show: (1) he is a member of a protected class; (2) he was subjected to unwelcome harassment; (3) the harassment was based on race; (4) the harassment had the effect of unreasonably interfering with the employee's work performance by creating an intimidating, hostile, or offensive work environment; and (5) the existence of employer liability. A hostile work environment occurs when the workplace is permeated with discriminatory intimidation, ridicule, and insult "that is sufficiently severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993); *Faragher v. Boca Raton*, 524 U.S. 775 (1998).

The lower Courts applied this Court's established principles in holding that the allegations in support of Petitioner's disparate treatment claim were also insufficient to establish a *prima facie* case of hostile work environment racial harassment, for the same reasons discussed above. Moreover, the additional three isolated incidents were not sufficiently severe or pervasive to alter the conditions of Petitioner's employment or to create an abusive work environment. *See Harris*, 510 U.S. at 21. Petitioner offers no explanation whatsoever as to why this Court should review the lower Court's dismissal of his hostile work environment claim.

C. Petitioner Has Not Provided Any Justification For Revisiting Its Well-Established Standards In Title VII Cases.

Petitioner urges this Court to accept review in order to overturn or soften the standards for establishing a *prima facie* case and the burden shifting provisions set forth in *McDonnell Douglas* and its progeny. However, Petitioner presents no compelling reason for revisiting *McDonnell Douglas*, which has provided consistent standards for analyzing discrimination cases under Title VII and other employment statutes for thirty years. The only justification offered by Petitioner for revisiting these standards is that minorities allegedly have difficulty obtaining counsel and often have their cases dismissed on summary judgment. This reasoning is flawed and plainly insufficient to justify this Court's review.

III. CONCLUSION

For the foregoing reasons, Respondent GM respectfully requests that this Court deny the Petition for Writ of Certiorari.

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